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PRACTICE,
PLEADING AND FORMS

IN ACTIONS

BOTH LEGAL AND EQUITABLE.

FORMS IN ACTIONS, IN SPECIAL PROCEEDINGS, IN PRO-
VISIONAL REMEDIES, AND OF AFFIDAVITS,
NOTICES, ETC.

ESPECIALLY ADAPTED TO THE PRACTICE

IN THE STATES OF CALIFORNIA,
OREGON, NEVADA AND THE
TERRITORIES.

AND APPLICABLE ALSO

TO THE PRACTICE IN NEW YORK, OHIO, INDIANA, IOWA,
AND OTHER STATES WHICH HAVE
ADOPTED A CODE.

BY MORRIS M. ESTEE,
COUNSELOR AT LAW.

IN THREE VOLUMES.

VOL. I.

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PREFACE.

In the preparation of this work my object has been to present to the profession the chief requisites of good pleading, with forms adapted to the modern practice, accompanied by numerous authorities sustaining them.

With this object in view, I have commenced at the first inquiry made by the practitioner, in bringing or defending an action, and have advanced with him step by step in the prosecution or defense of the same ; giving as far as possible within the scope of this work, the law relative to the *pleadings* and *practice*, with the *forms* necessary for use, to the final disposition of the cause.

Although the forms given are specially adapted to the practice in California, Nevada, and Oregon, and the territories on the Pacific slope, yet, with rare exceptions, they are equally applicable in New York and nearly all of the other States of the Union.

The notes under the forms have been arranged alphabetically, with side heads to each, which will be found to be an index to their contents, and a majority if not all of the recent decisions, not only of the Supreme Courts of the Pacific States, but of the various courts of the other States of the Union, and of England, have been consulted, and brief extracts or references to them appear under the appropriate headings.

The general principles discussed in the first part of this work, as well as the general propositions at the commencement of the leading subjects, Complaints, Summons, Change of Place of Trial, Demurrer, Answer, Notices, Motions, Statement, New Trial, Appeal, etc., will, it is believed, be a guide and assistance at each stage of the proceedings.

The forms have been carefully prepared, and in general will be found correct. Many of them have been tested by the courts of last resort, and their correctness sustained, as will be seen by reference to the authorities under each.

In submitting this book to the profession I am not unconscious of the necessity of bespeaking for it a just, if not a charitable criticism; and I trust that its imperfections, which are doubtless many, will not seriously impair its usefulness.

M. M. E.

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PART FIRST.

GENERAL PRINCIPLES.

CHAPTER I.

WRONGS AND THEIR REMEDIES.

1. Under this title it is not our purpose to discuss at length the innumerable wrongs which the law defines, or to explain particularly the remedies which the law secures to the party injured. An elaborate discussion of these questions will be found in the elementary text-books upon these subjects, our chief aim being to give briefly the mode of procedure in courts of justice whereby *wrongs* are *remedied*, without attempting to give the *reasons why*.

2. It is an axiom as old as human laws, that for every wrong suffered there is a remedy, which may be secured by a proper application to a *competent court* of justice, in an action against the *proper parties*, and in the *form* prescribed by law.

3. The proceedings in courts of justice to secure the proper and adequate remedies for injuries inflicted by another, are divided by our statute, and also by the

statutes of other states which have a code at all similar to ours, into

I. ACTIONS.

II. SPECIAL PROCEEDINGS.

III. PROVISIONAL REMEDIES.

I. OF ACTIONS.

4. An action is the history of the whole case, from the *declaration* to the acquisition of the *remedy* sought; an action is further defined to be an ordinary proceeding in a court of justice by which one party prosecutes another party for the enforcement or protection of a *right*, the redress or prevention of a *wrong*, or the punishment of a *public offense*. It has also been defined to be any judicial proceeding, which, if conducted to a determination, will result in a judgment. *People v. County Judge of Rensselaer*, 13 *How. Pr.* 400.

The following have been declared to be actions:

5. **Admeasurement of Dower.**—In New York, admeasurement of dower is an action. *Townsend v. Townsend*, 2 *Sand.* 711.

6. **Creditor's Suit.**—To set aside a fraudulent assignment is an action. (*Baker v. Bartol*, 6 *Cal.* 483; approved in *Riddle v. Baker*, 13 *Cal.* 302; *Kinder v. Macy*, 7 *Cal.* 206; *Fox v. Heath*, 16 *Abb. Pr.* 163; *Morrison v. Atwell*, 9 *Bosw.* 503.)—Or a fraudulent judgment. (*Scales v. Scott*, 13 *Cal.* 76.)—Or a fraudulent conveyance. *McMinn v. Whelan*, 27 *Cal.* 300; *Hager v. Shindler*, 29 *Cal.* 47; see, also, *Quick v. Keeler*, 2 *Sand.* 231; *Dunham v. Nicolson*, *Id.* 636.

7. **Dissolving Moneyed Corporation.**—A proceeding to dissolve a moneyed corporation is an action. *Ex parte Attorney-General*, 1 *Cal.* 85; *Kattenstroth v. Astor Bank*, 2 *Duer*, 632; *Howe v. Deuel*, 43 *Barb.* 504.

8. **Forcible Entry and Unlawful Detainer** is an action. (*Stat.* 5 *Ric.* 11, c. 8; *Termes de Ley*, *Cow.*; 4 *Black. Com.* 148; 4

Steph. Com. 280; 2 *Chitt. Gen. Pr.* 231, 233; 3 *A. K. Marshall's (Ky.) R.* 1,145.) It is an action in modern practice by the statutes of the various states, which consult. In California, see *Cal. Pr. Act Appen.*, p. 1; borne out by *Moore v. Goslin*, 5 *Cal.* 266; approved in *Frazier v. Hanlon*, 5 *Cal.* 159; *People v. Harris*, 9 *Cal.* 572; *Owen v. Doty*, 27 *Cal.* 502; *Hodgkins v. Jordan*, 29 *Cal.* 577; *Brummagim v. Spencer*, 29 *Cal.* 661.

9. Foreclosure of Mortgage is an action. 2 *Barbour's Ch. Pr.* 171-186; 2 *Crabb's Real Prop.* 918; 4 *Ken's Com.* 180; *Cal. Pr. Act*, §§ 246-248; supported by *McMillan v. Richards*, 9 *Cal.* 365; *Boggs v. Hargrave*, 16 *Cal.* 559; *Goodenow v. Ewer*, 16 *Id.* 461.

10. Landlord and Tenant.—Proceedings by landlord against a tenant is an action. (*Laws of Cal.* 1861, p. 514; *Cal. Pr. Act Appen.* p. 12, supported by *Reay v. Cotter*, 29 *Cal.* 168; *Owen v. Doty*, 27 *Cal.* 502.) And in New York a summary proceeding by a landlord to dispossess a tenant, is an action. *Duel v. Rust*, 24 *Barb.* 444.

11. Mandamus.—A proceeding by *mandamus* is an action. (*Cal. Pr. Act* §§ 446-479; supported by *People v. Judge Tenth Dist.*, 9 *Cal.* 19; *People v. Colborne*, 20 *How. Pr.* 378; *People v. San Francisco*, 27 *Cal.* 655; but see *People ex rel. Van Valkenburgh v. Sage*, 3 *How. Pr.* 56; 2 *Cow.* 444; 18 *Wend.* 575; 21 *Id.* 20; 2 *Hill*, 45; 5 *Id.* 616; 6 *Id.* 243; 17 *How. U. S.* 284.) It has been held to be a suit within the meaning of the Constitution of the United States, for it is the litigation of a right in a court of justice seeking a decision. 2 *Pet.* 449; 14 *Id.* 564.

12. Nuisance.—Actions for nuisance defined, (*Cal. Pr. Act* § 249; supported by *Stiles v. Laird*, 5 *Cal.* 122; *Fitzgerald v. Urton*, 4 *Cal.* 235; *Courtwright v. Bear Riv. and Aub. Wat. and Min. Co.*, 30 *Cal.* 573.) An action to prevent or abate a nuisance is not a "special case." (*Parsons v. Tuol. Water Co.*, 5 *Cal.* 43; approved in *Brock v. Bruce*, *Id.* 280; *Ricks v. Reed*, 19 *Id.* 574.) It is a case in equity. (*People v. Moore*, 29 *Cal.* 427.) The modern remedy both in England and in the United States is an action (2 *Burr. Law Dict.* 248), the writ having been abolished and the action substituted by statute. *N.Y. Code*, § 453; *Ellsworth v. Putnam*, 16 *Barb.* 565; *Hubbard v. Russell*, 24 *Barb.* 404; *Brown v. Woodworth*, 5 *Barb.* 550; *Hess v. Buffalo R. Co.*, 28 *Barb.* 391; *Brady v. Weeks*, 3 *Barb.* 157; *Clark v. Storrs*, 4 *Barb.* 562; *Brown v. Cayuga R. R. Co.*, 2 *Kern.* 486.

13. Partition.—A proceeding for the partition of real estate is an action. *Cal. Pr. Act*, §§ 264–309; supported by *Stark v. Barrett*, 15 *Cal.* 361; *Morenhout v. Higuera*, 32 *Cal.* 289; *De Uprey v. De Uprey*, 28 *Cal.* 331; *Bollo v. Navarro*, 33 *Cal.* 459; *Gates v. Salmon*, 35 *Cal.* 576; 1 *Steph. Com.* 317; *Backus v. Stillwell*, 3 *How. Pr.* 318; 1 *Code R.* 70; *Meyers v. Rasback*, 4 *How. Pr.* 83; 2 *Code R.* 13; *Meyers v. Borland*, *Id.*; qualified in *Traver v. Traver*, 3 *Id.* 351. It is an action provided by statute. 4 *Ken's Com.* 364–5; *N.Y. Code*, § 448.

14. Quantum Valebant.—Proceedings for value of goods delivered on a *quantum valebant* are actions. *Ruiz v. Norton*, 4 *Cal.* 355; *Bridges v. Page*, 13 *Cal.* 640.

15. Quieting Title.—A proceeding to determine the adverse possession or title to real estate is an action. *Cal. Pr. Act*, § 254; *Smith v. Brannan*, 13 *Cal.* 107; *Boggs v. Merced Min. Co.*, 14 *Id.* 279; *Curtis v. Sutter*, 15 *Id.* 259; *Morton v. Folger*, *Id.* 275; *Head v. Fordyce*, 17 *Id.* 149; approved in *Horn v. Jones*, 28 *Cal.* 204; *Joyce v. McAvoy*, 31 *Cal.* 287; *Pralus v. Pacific G. and S. Min. Co.*, 35 *Cal.* 31; *Rico v. Spence*, 21 *Id.* 504; *Haynes v. Calderwood*, 23 *Id.* 409; approved in *Sharp v. Lumley*, 34 *Cal.* 615; *Lyle v. Rollins*, 25 *Id.* 437; approved in *Hawkins v. Reichert*, 28 *Cal.* 536; *Brooks v. Calderwood*, 34 *Cal.* 565; *Pralus v. Jefferson G. and S. Min. Co.*, 35 *Cal.* 559; *Ferris v. Irving*, 28 *Id.* 645; *Hager v. Shindler*, 29 *Id.* 47; *Reed v. Calderwood*, 22 *Id.* 109; *Arrington v. Liscom*, 34 *Id.* 365; *Mann v. Provost*, 3 *Abb. Pr.* 446; *Fish v. Fish*, 39 *Barb.* 513; *Hammond v. Tillotson*, 18 *Barb.* 332; disapproving *Crane v. Sawyer*. 5 *How. Pr.* 372.

16. Quo Warranto.—Proceedings to try the title to office, etc., are civil actions. *Gen. Laws of Cal.*, ¶ 760; *Cal. Pr. Act*, §§ 310–316, 147; *Ex parte Attorney-General*, 1 *Cal.* 85; *People v. Olds*, 3 *Id.* 167; approved in *Satterlee v. San Francisco*, 23 *Id.* 320; *People v. Scannell*, 7 *Id.* 432; *People v. Jones*, 20 *Id.* 50; cited in *Stone v. Elkins*, 24 *Cal.* 127; and in *People v. Holden*, 28 *Cal.* 130; *Magee v. Supervisors of Calaveras Co.*, 10 *Id.* 376; approved as to remedy by *quo warranto* in *Stone v. Elkins*, 24 *Cal.* 127; *People v. Cook*, 4 *Seld.* 71; 8 *N.Y.* 67; *People v. Clark*, 11 *Barb.* 337; *People v. Pease*, 30 *Barb.* 588; 27 *N.Y.* 45; 25 *How. Pr.* 495; *Mayor of N. Y. v. Conover*, 5 *Abb. Pr.* 171; *Lewis v. Oliver*, 4 *Abb. Pr.* 121; *People v. Sampson*, 25 *Barb.* 254.

17. Steamers, Boats, and Vessels.—Proceedings against steamers, boats, and vessels, are actions. *Cal. Pr. Act*, §§ 317–332, statute explained; “The Moses Taylor,” 4 *Wall. U. S.* 411; see *People v. Steamer “America,”* 34 *Cal.* 676.

18. Undertakings.—A proceeding on an appeal bond for recovery of the penalty is an action. (*Palmer v. Vance*, 13 *Cal.* 553; *Roussin v. Stewart*, 33 *Id.* 208.) Or, on an injunction bond. (*Downing v. Polack*, 18 *Id.* 625.) In proceedings on undertakings to stay writ. *De Castro v. Clark*, 29 *Cal.* 11; *Wolfkiel v. Mason*, 16 *Abb. Pr.* 221; *Rice v. Whitlock*, 16 *Abb. Pr.* 225; *Onderdonk v. Emmons*, 2 *Hill.* 504; *Smith v. Crouse*, 24 *Barb.* 433; *Chickering v. Robinson*, 3 *Cush.* 543; *N. Y. Code* § 356.

19. Waste.—An action lies for waste. *Gen. Laws of Cal.* ¶ 5,188; *Cal. Pr. Act*, §§ 250–2; *Sampson v. Hammond*, 4 *Cal.* 184; *Van Deusen v. Young*, 29 *N. Y.* 9; 2 *Rev. Stat.* 333, § 8; *Livingston v. Haywood*, 11 *Johns.* 429; *Bates v. Schraeder*, 13 *Id.* 260; *N. Y. Code of Pro.* §§ 450–452.

20. Willful Trespass.—An action lies for willful trespass upon lands. *Cal. Pr. Act*, §§ 251–2; *Laws of Cal.* 1865–6, p. 440–3; *N. Y. Code*, § 91; *Laws of N. Y.* 1862, p. 474; *Pico v. Webster*, 14 *Cal.* 202.

II. OF SPECIAL PROCEEDINGS WHICH ARE NOT ACTIONS.

21. Remedies pursued by a party and which do not result directly in a final judgment but only in establishing a right or some particular fact, are special proceedings. (3 *Wend.* 42; 12 *Pick.* 572; *Porter v. Purdy*, 29 *N. Y.* 106.) They include proceedings confined to courts of justice, and from which an appeal will lie; (*People ex rel. Harvey v. Heath*, 20 *How. Pr.* 304;) such as proceedings instituted for the correction or revision of erroneous acts of a court, or officer appointed by the court, having particular qualifications or occupying some particular relation to the parties or the subject matter, and whose acts are in the nature of adjudica-

tions upon which the subsequent proceedings rest, however erroneous they may be. *Porter v. Purdy*, 29 *N.Y.* 106.

22. Special cases have been enumerated as follows: *case stated*; *case reserved*; and *case prepared*. (1 *Burr. Law Dict.* 254.) A statement of facts in writing agreed on by the parties, and submitted without trial to obtain an opinion or decision on the points of law arising on such facts is a case agreed on, or *case stated*. 1 *Chitt.* 720; 3 *Wharton's R.* 143; 8 *Serg & R.* 529; 3 *Steph. Com.* 621.

23. A statement in writing, of the facts proved on trial of a cause, drawn and settled by the attorneys under the supervision of the judge, for the purpose of having certain points of law determined upon full argument before the court, is a special case or *case reserved*. 3 *Bl. Com.* 378; 3 *Steph. Com.* 621; *Steph. Pl.* 92; 1 *Arch. Pr.* 216; 1 *Burr. Pr.* 242, 463.

24. A case prepared by a party, against whom a verdict has been given, upon which to move the court to set aside the verdict and grant a new trial, is a *case prepared*. (1 *Burr. Law Dict.* 254; *Grah. Pr.* 330; 1 *Burr. Pr.* 469.) In modern practice, however, only a memorandum of the facts is made at the trial, and the case itself is not prepared till some days after. 1 *Burr. Law Dict.* 254.

25. **Act of Legislature.**—Where the legislature creates a right of action and makes no special provision for its enforcement, such action may be commenced and prosecuted pursuant to the provisions of the general law, and parties to such actions may take any and all steps authorized thereby. (*Burson v. Cowles*, 25 *Cal.* 537.) But the term "special cases" in the Constitution, Art. vi. § 8, does not include any class of cases

for which courts of general jurisdiction have always supplied a remedy. It must be applied to such new cases as are the creation of statutes. (*Parsons v. Tuol. Co. Wat. Co.*, 5 *Cal.* 43.) And in such cases the statute must be strictly pursued. *Cohen v. Barrett*, 5 *Cal.* 195.

26. Admission to Practice.—Application for admission to practice as an attorney is a special proceeding, and an appeal lies from an order denying such application. *Matter of Cooper*, 22 *N. Y.* 67; *Matter of the Graduates*, 11 *Abb. Pr.* 301; reversing *Matter of the Graduates of the University*, 31 *Barb.* 353; 10 *Abb. Pr.* 348; 19 *How. Pr.* 97; *Matter of the Graduates of Columbia*, 10 *Abb. Pr.* 357; 19 *How. Pr.* 136.

27 Appraisalment.—A proceeding by commissioners to appraise compensation for lands taken under the General Railroad Act. (*N. Y. Cent. R. R. Co. v. Maroni*, 1 *Kern.* 277.) On disputed salvage. *Gen. Laws of Cal.* ¶ 7,364.

28. Arbitration and Award.—A proceeding on arbitration is not an action. (*Cal. Pr. Act*, §§ 380–389.) It is an adjudication upon a matter in controversy by private individuals selected and appointed by the parties. (3 *Black. Com.* 16; 3 *Steph. Com.* 374; *Billings on Awards*, 3, 55–65; *Russell's Arbitrator*, 112.) Proceedings on arbitrations are not affected by the Code. (*N.Y. Code*, 836.) Such proceedings are, however, regulated by statute.

29. Assessments.—Proceedings to assess damages on laying out a plank road, or under road laws, are not actions. *Gen. Laws of Cal.* ¶ 6,451; *Lincoln v. Colusa Co.*, 28 *Cal.* 662; *Grigsby v. Burnett*, 31 *Cal.* 406; *Ex parte Ransom*, 3 *N.Y. Code R.* 148; *Re Fort Plain and Cooperstown Pl. Road Co.*, 3 *Code R.* 148; see also *N. Y. Cent. R. R. Co. v. Maroni*, 11 *N.Y.* 276.

30. Attachment.—In New York, a proceeding to enforce a judgment by attachment, as for contempt, is also a special proceeding. *Gray v. Cook*, 15 *Abb. Pr.* 308.

31. Certiorari.—*Certiorari* is simply a writ of review and not an action (*Cal. Pr. Act*, §§ 455–6), and does not lie where there is an appeal or other remedy at law. (1 *Hill.* 195; 2 *Id.* 12; *People v. Shepard*, 28 *Cal.* 115; *Miliken v. Huber*, 21 *Cal.* 166; *People v. Dwinelle*, 29 *Cal.* 632; *People v. Stillwell*, 19 *N.Y.* 532; *Onderdonk v. Supervisors of*

Queen's, 1 *Hill* 195; *People v. Overseers of the Poor*, 44 *Barb.* 467; *People v. Board of Pilots*, 37 *Barb.* 126.) At common law it tries nothing but the jurisdiction. (*People v. Board of Delegates of San Francisco Fire Department.*, 14 *Cal.* 479.) But that our statute is affirmatory of the common law, *People v. Hester*, 6 *Cal.* 679, was overruled in *People v. Board of Delegates, etc.*, 14 *Cal.* 479; and was cited as overruled in *People v. Provines*, 34 *Cal.* 527.

32. Confession of Judgment.—A judgment by confession may be entered without action. (*Cal. Pr. Act*, §§ 374–376; *N.Y. Code*, § 382; *Gunter v. Sanchez*, 1 *Cal.* 48; see *Cordier v. Schloss*, 12 *Cal.* 143; affirmed in *S.C.* 18 *Id.* 580; and cited in *Wilcoxon v. Burton*, 27 *Id.* 235, in which the latter case was approved; *Allen v. Smillie*, 1 *Abb. Pr.* 358; 12 *How. Pr.* 156; *Hill v. Northrop*, 9 *How. Pr.* 526.) And the statute must be strictly pursued. (*Chapin v. Thompson*, 20 *Cal.* 681.) So of proceedings on motion, setting aside a judgment by confession. (*Belknap v. Waters*, 11 *N.Y.* 497; compare *Bowery Extension Case*, 2 *Abb. Pr.* 368.) The purpose and true interpretation of the provisions of the Code regulating confessions of judgment are explained in *Hopkins v. Nelson*, 24 *N. Y.* 518; *Neusbaun v. Keim*, *Id.* 325; reversing *S. C.* 1 *Hill*. 520; 7 *Abb. Pr.* 23.

33. Contempt.—Proceedings in punishment for contempts are not actions. (*Cal. Pr. Act*, § 245.) As to contempts of witness, or party for disobedience of order of referee, (*Page v. Randall*, 6 *Cal.* 32;) for disobedience of subpoena, (*Cal. Pr. Act*, § 409; *Andrews v. Andrews*, *Col. and C. Cas.* 121;) for refusing to testify, (*Id.* 420; *Forbes v. Meeker*, 3 *Edw.* 452;) for refusal to allow inspection of books, (*Id.* 446;) for disobeying writ of mandate, (*Id.* 479; *McCauley v. Brooks*, 16 *Cal.* 11;) for other acts enumerated, (*Cal. Pr. Act*, § 480; *People v. Dwinelle*, 32 *Cal.* 296; 1 *Tidd's Pr.* 479–480; 4 *Black. Com.* 285; 4 *Steph. Com.* 348; *Holstein v. Rice*, 15 *Abb. Pr.* 307; *Gray v. Cook*, *Id.* 308.) The provisions of the Revised Statutes concerning contempts in New York are not affected by the Code of Procedure. They are to enforce civil remedies and protect the rights of parties. *People v. Compton*, 1 *Duer*, 512; *Re Smethurst*, 3 *Code R.* 55; 2 *Sand.* 724.

34. Corporate Authority.—The proceedings before the corporate authorities or the County Court, provided for by the Act of Jan. 24th, 1860, regulating the mode of settling claims to lots in town sites situated on public lands in Humboldt County, is a "special case" within

the meaning of the constitution. (*Ricks v. Reed*, 19 *Cal.* 551.) The jurisdiction in such cases is not strictly appellate, but original, and without reference to the evidence presented to the corporate authorities, the whole matter is investigated anew. (*Id.*) And the action is governed by the rules applicable to actions commenced in a court of record. *Ryan v. Tomlinson*, 31 *Cal.* 11.

35. Contested Elections.—The act giving jurisdiction over contested elections to the County Judge is constitutional. It is one of the "special cases" provided for. *Saunders v. Haynes*, 13 *Cal.* 145; approved as to jurisdiction in *Stone v. Elkins*, 24 *Cal.* 126; *Dorsey v. Barry*, *Id.* 452; and cited in *People v. Days*, 15 *Cal.* 91; and approved as to such being "special cases" in *Keller v. Chapman*, 34 *Cal.* 640.

36. Highways.—In New York, an appeal before referees in highway proceedings is not an action. (*People v. Flake*, 14 *How. Pr.* 527.) Nor is a proceeding to open streets. *Re The Bowery*, 12 *How. Pr.* 97.

37. Indigent Relative.—The proceeding to compel one to support an indigent relative in such states as have a statute on this subject, is a special proceeding under the act. *Haviland v. White*, 7 *How. Pr.* 154.

38. Insolvency Cases.—Insolvency cases are "special cases," and it was an exercise of legitimate power in the Legislature to confer jurisdiction in such cases upon both County and District Courts. (*Harper v. Frelon*, 6 *Cal.* 76; approved in *McNeil v. Borland*, 23 *Cal.* 148; see, also, *Frank v. Brady*, 8 *Cal.* 47; and *People ex rel. Grow v. Rasborough*, 29 *Cal.* 418.) All insolvency cases however have been superseded by the United States Bankruptcy Act. Proceedings in insolvency are not *stricti juris* either proceedings in law or equity, but a new remedy or proceeding created by statute. (*Cohen v. Barrett*, 5 *Cal.* 195; approved as to jurisdiction in "insolvency cases," in *Frank v. Brady*, 8 *Cal.* 47.) That cases in insolvency are not equity cases, approved in *People ex rel. Grow v. Rasborough*, 29 *Cal.* 418.

39. Joint Debtors.—Proceedings against joint debtors after judgment are not actions. (*Cal. Pr. Act*, §§ 368–373; *N.Y. Code*, § 375.) In proceedings of this character, does the cause of action or right to proceed arise upon judgment or upon the original demand? The proceedings bear a strong similiarity to the action of *scire facias*, and were no doubt intended as a substitute therefor. (*Alden v. Clark*, 11 *How. Pr.* 213.)

Such a proceeding is not a new action, and the party served cannot have the action removed into a federal court. (*Fairchild v. Durand*, 8 *Abb. Pr.* 305.) The remedy by this proceeding is merely cumulative. *Dean v. Eldredge*, 29 *How. Pr.* 218.

40. Probate.—Probate proceedings are not civil actions within the meaning of the Practice Act. *Estate of Scott*, 15 *Cal.* 220.

41. Referees.—A proceeding before referees is not an action. (*Cal. Pr. Act*, §§ 181–184; *Plant v. Fleming*, 20 *Cal.* 92; *People v. Flake*, 14 *How. Pr.* 527.) Our statute concerning referees is in aid of the common law remedy by arbitration, and does not alter its principles. *Tyson v. Wells*, 2 *Cal.* 122; affirmed in *Healy v. Reed*, *Id.* 325; *Grayson v. Gould*, 4 *Id.* 125; *Phelps v. Peabody*, 7 *Id.* 53.

42. Review of Assessment.—Proceedings to review the acts of assessors appointed to assess the property of the parties benefited by the construction of a sewer, with their proportionate expense, are not actions. (*Porter v. Purdy*, 29 *N.Y.* 106.) A proceeding to vacate a local assessment in the city of New York is not a special proceeding in the sense of the code. *Re Dodd*, 27 *N.Y.* 629.

43. Specific Performance.—In New York, proceedings to compel a specific performance of contract of ancestor by heirs of deceased are not actions. *Hyatt v. Seely*, 11 *N.Y.* 52.

44. Submission of Controversy.—Parties may without action agree upon a case, and present a submission of the same to any court which should have jurisdiction. (*Cal. Pr. Act*, §§ 377–379; *Crandall v. Amador Co.*, 20 *Cal.* 72.) Such a proceeding is not an action. *Lang v. Ropke*, 1 *Duer*, 702.

45. Supplementary Proceedings.—That proceedings supplementary to execution are special proceedings, see (*Gould v. Chapin*, 4 *How. Pr.* 185; *Davis v. Turner*, *Id.* 190. *Contra Dresser v. Van Pelt*, 15 *How. Pr.* 19.) In California they are a substitute for the creditor's suit, and are therefore actions. See *Ante*, Note 6.

46. Testimony.—Proceedings to perpetuate testimony are not actions. *Cal. Pr. Act*, §§ 437–442.

III. OF PROVISIONAL REMEDIES.

47. The provisional remedies created by statute are

either, before judgment to provide for the safety and preservation of the property in the possession of an adverse party, or after judgment to dispose of the same, or to preserve it during the pendency of an appeal. They are not special proceedings. (*Genin v. Tompkins*; 1 *Code R.*, (N.S.) 415.) Nor are they ordinary proceedings in the sense of the term requiring notice of process to be served after an appearance in an action. (*Becker v. Hager*, 8 *How. Pr.* 69.) The provisional remedies under the statute of California are *arrest and bail, attachment, claim and delivery* of personal property, and *injunction*.

48. Arrest and Bail.—For the provisional remedy of arrest and bail, as provided by statute in California, see *Cal. Pr. Act*, §§ 72–98.

49. In the District of Columbia, arrest for debt has been abolished. *Act of Congress*, Feb. 3, 1853; 10 *Stat. at L.* 153; 1 *Bright*, 91.

50. The United States Statute of 1839 adopted only the state laws then existing; and the Massachusetts Statutes of 1855 and 1857 do not abolish imprisonment for debt, within the meaning of that statute. *Campbell v. Hadley*, *Sprague*, 470; *Matter of Freeman*, 2 *Curt. C. Ct.*, 491.

51. This provisional remedy exists in New York. (See *N.Y. Code*, §§ 178–205.) But the right to its exercise is waived, if plaintiff unites in his complaint causes of action, to some or one of which the provisional remedy does not apply. (*Lambert v. Snow*, 9 *Abb. Pr.* 91.) That it is a provisional remedy under the Code, see *Continental Bank v. De Mott*, 8 *Bosw.* 696.

52. Attachment.—Of the provisional remedy of attachment and proceedings therein in California, see (*Cal. Pr. Act*, §§ 120–141.) It is a creature of statute, and is only given in cases of indebtedness arising upon contract; (*Griswold v. Sharpe*, 2 *Cal.* 17;) for the direct payment of money; (*Dutton v. Shelton*, 3 *Cal.* 206.) It is a proceeding auxiliary to the action at law, designed to secure the payment of any judgment plaintiff may obtain. (*Low v. Adams*, 6 *Cal.* 277.) The remedy commented on in (*Meyer v. Mott*, 29 *Cal.* 372.) It must be strictly pursued.

(*Roberts v. Landecker*, 9 *Cal.* 262.) A plaintiff cannot avail himself of this remedy where he has a lien to secure his debt. *Porter v. Brooks*, 35 *Cal.* 199.

53. In Delaware, the remedy of a foreign attachment lies, notwithstanding the non-resident is in the State temporarily when the process issues. (*Burcalow v. Trump*, 1 *Houst.* 363.) But it does not apply when the defendant is a foreign corporation. *Bogle v. New Grenada Co.*, 1 *Houst.* 294.

54. In Illinois, it is a provision in derogation of the common law, and ought not to be extended by implication. (2 *Gilm.* 428; 23 *Ill.* 66.) And its benefit is not confined to any particular form of action. 11 *Ill.* 471.

55. In Iowa, the attachment remedy applies under the Code. (*Iowa Code*, § 1852.) But it does not apply to the case of a non-resident debtor. *Pitkins v. Boyd*, 4 *Greene*, 255.

56. In Kentucky, it is declared to be a provisional remedy in a personal action. *Code of Ky.* § 221; *Duncan v. Wickliffe*, 4 *Met.* 118.

57. In Maryland, the remedy is declared to be special, and of limited jurisdiction where the power to act must appear on the face of the record. *Risewick v. Davis*, 19 *Md.* 82.

58. In Minnesota, the attachment may issue in all actions for the recovery of money. *Comp. Stat. of Minn.* §§ 142-144; *Morrison v. Lovejoy*, 6 *Minn.* 183.

59. In Missouri, the remedy is not confined to resident creditors, but is open to non-residents. (*Graham v. Bradbury*, 7 *Mo.* 281; *Posey v. Buckner*, 3 *Mo.* 604; *Perpetual Ins. Co. v. Cohen*, 9 *Mo.* 416.) This is strictly in derogation of the common law. 16 *Johns.* 5; *Clarke v. New Jersey Steam Nav. Co.*, 1 *Story*, 531.

60. For proceedings in New York under the provisional remedy of attachment, see (*N.Y. Code*, §§ 227-243.) It is a new remedy which did not exist under the old system. (*Renard v. Hargous*, 3 *Kern.* 259.) And is for the benefit of the individual creditor. *Frazer v. Greenhill*, 3 *Code R.* 172; *Fisher v. Curtis*, 2 *Id.* 62; 2 *Sand.* 68; *Furman v. Walter*, 13 *How. Pr.* 348.

61. In Ohio, the provisional remedy of attachment, which was somewhat altered by the adoption of their Code, gives priority to the one who first sues. *Ohio Code*, §§ 191-236.

62. In Pennsylvania, the remedy is provided for all actions in contract. *Strock v. Little*, 45 *Penn. St. R.* 416.

63. In Virginia (*Rev. Code*, 1819, § 474), the remedy by attachment is not a proceeding *in rem*, but a suit wherein a decree is conclusive only against parties and their privies. *Mankin v. Chandler*, 2 *Brock. Marsh.* 125.

64. **Claim and Delivery.**—At common law the action of replevin never lies, unless there has been a tortious taking of the goods and chattels. (1 *Mass.* 319; 10 *Johns.* 369; 7 *Johns.* 140; 34 *Ill.* 436; *Duane v. Duane*, 43 *N. H.* 37.) But by the modern action of claim and delivery, which is a substitute for the old action of replevin, the remedy has been extended under the provisional remedy adopted in most of the states and territories of the Union; and it may be brought whenever one person claims personal property in the possession of another. (20 *Wend.* 234; 6 *Binn.* 3; 1 *Hemp.* 10; 23 *Penn.* 168.) The primary object is the recovery of the thing itself; its value is only claimed in the alternative. *Hunt v. Robinson*, 11 *Cal.* 277; *Savage v. Perkins*, 11 *How. Pr.* 17; *Hickey v. Hinsdale*, 12 *Mich.* 99.

65. As to the provisional remedy of claim and delivery in California, see (*Cal. Pr. Act*, §§ 99-110.) It is at least commensurate with the action of detinue at common law. *McLaughlin v. Piatti*, 27 *Cal.* 464.

66. In Delaware, the remedy by replevin is extended to cases of wrongful detention of goods. *Stapleford v. White*, 1 *Houst.* 238.

67. In Indiana, the remedy of replevin is provided by statute; (*Laws of Ind.*, 1851, p. 141;) and it covers suits for the recovery of personal property and of injury to the same; (*Jocelyn v. Barrett*, 18 *Ind.* 128; *Bedinger v. Jocelyn*, *Id.* 325;) the remedy being merely cumulative, so far as the claimants' remedies are concerned. *Firestone v. Mishler*, 18 *Ind.* 439.

68. In Massachusetts, the jurisdiction in replevin under the statute provision depends upon the value of the goods. *Davenport v. Burke*, 9 *Allen*, 116.

69. In Missouri, the remedy of replevin under the statutes is a transitory action; (*Rev. Stat. of Mo.*, 1825 p. 659; *Crocker v. Mann*, 3 *Mo.* 472;) and under the new *Code (Acts of 1848-9*, p. 82, Art. viii.) the provisional remedy was extended. *McKnight v. Crinnion*, 22 *Mo.* 559.

70. Injunction.—The writ of injunction has been substituted by the provisional remedy of injunction which is enforced by an order of the courts. At common law, it was “a judicial process whereby a party is required to do a particular thing, or refrain from doing a particular thing, according to the exigency of the writ.” (2 *Story's Eq. Jur.* § 861; 3 *Daniells Ch. Pr.* 1,809.) In modern practice it is a remedy provided by statute to restrain an act. *Cal. Pr. Act.* §§ 111-119; *N.Y. Code*, §§ 218-226; *Ohio Code*, §§ 237-252.

71. No particular form for a writ is necessary. (*Summers v. Farish*, 10 *Cal.* 347; affirmed in *Prader v. Purkett*, 13 *Id.* 591; *Browner v. Davis*, 15 *Id.* 11.) It is said to be wholly a *preventive* remedy; (*Hilliard on Inj.* 3; *Bosley v. Susquehanna*, 3 *Bland.* 63;) and is either *provisional* or *perpetual*; (*Hilliard on Inj.*, 6;) and the claim for an order of injunction cannot be pleaded to. *Lingwood v. Stowmarket Co.*, *Law Rep.* 1 *Eq.* 77.

72. The remedy should not be granted when there is a remedy at law; (*Logan v. Hillegass*, 16 *Cal.* 200; *Rogers v. City of Cincinnati*, 5 *McLean* 337; *Nicolson v. Hancock*, 4 *Hen. and M.* 491; *Robinson v. Byson*, 1 *Bro. C.* 588; *Wallace v. McVey*, 6 *Ind.* 300;) as the remedy is notwithstanding the statutory provision for its exercise, only such in the absence of a legal remedy. *Scheetz, etc.*, 35 *Penn.* 95.

73. An injunction bill, strictly speaking, asks no other relief; if it does the injunction is regarded as auxiliary, and falls to the ground with it. (*Blackwood v. Van Vleck*, 11 *Mich.* 252.) Except to stay waste, or some irreparable injury, it is only auxiliary to the primary equity. *Hilliard on Inj.* 12; *Patterson v. Miller*, 4 *Jones Eq.* 451; *Washington v. Emery*, *Id.* 29; *Eborn v. Waldo*, 6 *Jones Eq.* 111; *Martin v. Cook*, *Id.* 199; *Stockton v. Briggs*, 5 *Jones Eq.* 309; *Schofield v. Bokkelin*, *Id.* 342; *McRae v. Atlantic*, *Id.* 395.

74. It is said by the Court in Massachusetts, “where the legislature have power to provide for the redress of either a public or private wrong, the remedy or mode of redress is wholly a subject of legislative discretion.” If an injunction is better adapted to accomplish the objects proposed than any other form of judicial process, there seems no reason why the legislature should not have power to direct it. *Hilliard on Inj.* 54.

CHAPTER II.

JURISDICTION.

1. Jurisdiction is the power to hear and determine a cause. (6 *Peters' U.S.* 691, 709; 2 *How. U.S.* 319, 338; *Hickman v. O'Neal*, 10 *Cal.* 292.) In a more general sense the power to make law; the power to legislate or govern; the power or right to exercise authority. 1 *Burr* 113.

2. Each branch of government has its functions assigned, and is beyond the control of the other departments of government. (*Parsons v. Tuol. Co. Wat. Co.*, 5 *Cal.* 43.) Thus, legislative functions cannot be exercised by the judiciary. (*People v. Town of Nevada*, 6 *Cal.* 143; approved in *Colton v. Rossi*, 9 *Cal.* 599; *Stone v. Elkins*, 24 *Id.* 127; *People v. Sanderson*, 30 *Id.* 167.) Nor can the courts of justice interfere with the political powers of the legislature. *Nougues v. Douglass*, 7 *Cal.* 65; cited in *McCauley v. Brooks*, 16 *Cal.* 43; *Napa Valley R. R. Co. v. Napa Co.*, 30 *Id.* 435.

JURISDICTION IN GENERAL.

3. The jurisdiction of a court will generally be presumed in the case of superior courts, or courts of general jurisdiction, where the want of it does not appear upon the face of the record. *Thompson v. Manrow*, 2 *Cal.* 99; *Kilburn v. Ritchie*, *Id.* 145; *White v. Albernathy*, 3 *Id.* 426; approved in *Nelson v. Lemon*, 10 *Cal.* 50; *Nelson v. Mitchell*, *Id.* 93; and *Wilson v. Truebody*,

Cal. Sup. Ct. Jul. T., 1864; *Johnson v. Sepulbeda*, 5 *Id.* 149; *Grewell v. Henderson*, 7 *Id.* 290; *Gray v. Hawes*, 8 *Id.* 562; *Carpentier v. Oakland*, 30 *Id.* 439; approved in *Hahn v. Kelly*, 34 *Id.* 391; which authority cites *Forbes v. Hyde*, 31 *Id.* 342; *Sharp v. Daugney*, 33 *Cal.* 505.

4. Where jurisdiction is limited by the constitution or by statute, the consent of parties cannot confer it upon the court. (*Gray v. Hawes*, 8 *Cal.* 562.) But where the limit regards certain persons, they may, if competent, waive their privilege, and thus confer jurisdiction. *Id.*

5. So the agreement of parties cannot operate to divest a court of its jurisdiction. *Muldrow v. Norris*, 2 *Cal.* 74.

6. A decided distinction exists between the want of jurisdiction and irregularly acquired jurisdiction. In the first case, the judgment can be attacked in any form directly or collaterally; in the second, only by direct proceeding in the court which rendered it. *Whitwell v. Barbier*, 7 *Cal.* 64; approved in *Peck v. Strauss*, 33 *Cal.* 685.

AT CHAMBERS.

7. The general rule is, that all judicial business must be transacted in court, and that there must be some express warrant of the statute to authorize any of it to be transacted at chambers. *Larco v. Casaneuava*, 30 *Cal.* 560; affirmed in *Norwood v. Kenfield*, 34 *Cal.* 332.

8. A judge at chambers has no power to make an order directing the clerk of his court to enter in the minutes of the court, *nunc pro tunc*, an order alleged to

have been made in open court. (*Hegeler v. Henckell*, 27 *Cal.* 491.) Nor to make an order setting aside an execution issued on a judgment, and perpetually staying the enforcement of the same. (*Bond v. Pacheco*, 30 *Cal.* 530; affirmed in *Norwood v. Kenfield*, 34 *Cal.* 332.) Nor to entertain motions to strike out pleadings or parts of pleadings. *Larco v. Casaneuava*, 30 *Cal.* 560; affirmed in *Norwood v. Kenfield*, 34 *Cal.* 332.

CONCURRENT JURISDICTION.

9. There is nothing in the nature of jurisdiction which renders it exclusive. (*Delafield v. State of Illinois*, 2 *Hill.* 164.) But on the contrary it may be concurrent. *Perry v. Ames*, 26 *Cal.* 372; approved in *Cariaga v. Dryden*, 30 *Cal.* 246; *Knowles v. Yeates*, 31 *Id.* 90; and *Courtwright v. B. R. and Auburn Wat. and Min. Co.*, 30 *Cal.* 585.

10. The Legislature cannot confer on one court the functions and powers which the Constitution has given to another, where that jurisdiction is exclusive. *Courtwright v. Bear Riv. and Aub. Wat. Co.*, 30 *Cal.* 580.

11. If exclusive jurisdiction be not conferred upon a court by the Constitution, then the Legislature may confer on other courts the powers and functions which the Constitution has conferred on that court. (See *Perry v. Ames*, 26 *Cal.* 372; see, also, *Courtwright v. Bear Riv. Aub. Wat. Co.*, 30 *Id.* 585.) This has been practically demonstrated in *American Co. v. Bradford*, 27 *Cal.* 360; cited in *Hill v. Smith*, 27 *Id.* 476; 30 *Cal.* 385; see, also, *People v. Davidson*, 30 *Id.* 379; *Warner v. Steamer "Uncle Sam,"* 9 *Cal.* 697.

12. The grant of original jurisdiction in the *Constitution*, to a particular court, of a class of cases, without any words excluding other courts from exercising jurisdiction in the same cases, does not necessarily deprive other courts of concurrent jurisdiction in such cases. *Courtwright v. Bear Riv. and Aub. Wat. and Min. Co.* 30 *Cal.* 573.

13. Jurisdiction *in rem* may exist in several courts at the same time, on the same subject. *Averill v. The Hartford*, 2 *Cal.* 309; affirmed in *Taylor v. Steamer "Columbia,"* 5 *Cal.* 272; *Meiggs v. Scannell*, 7 *Id.* 408; *Fisher v. White*, 8 *Id.* 422.

14. The court whose *mesne* or final process has made the first actual seizure of the *thing*, must have exclusive power over its disposal and the distribution of the fund arising therefrom, and the judgments of all other courts when properly authenticated and filed in the court having custody of the fund, must be regarded as complete adjudications of the subject matter of litigation, and be entitled to distribution accordingly. *Russell v. Alvarez*, 5 *Cal.* 48.

15. So an action for the non-delivery of freight may exist in the District Court of the United States, contemporaneously with an action for freight-money in a state court, without fear or danger of any collision or clashing of jurisdiction. *Russell v. Alvarez*, 5 *Cal.* 48.

16. Courts cannot interfere with the judgments or decrees of other courts of concurrent jurisdiction. *Anthony v. Dunlap*, 8 *Cal.* 26; affirmed in *Uhlfelder v. Levy*, 9 *Cal.* 614; *Revalk v. Kraemer*, 8 *Id.* 66.

17. Courts of equity and courts of law have concurrent jurisdiction in enforcing contribution between co-sureties. (*Chipman v. Morrill*, 20 *Cal.* 130.) The "real difference between courts of equity and courts of law is in the modes of proof, trial and relief. It will generally be found that they harmonize as to *principles*." (*Lubes' Equity Pl.* 6.) It is a familiar rule that where a court of *law* can give an adequate remedy, courts of *equity* will not entertain jurisdiction.

JURISDICTION OF STATE COURTS.

18. State courts have jurisdiction in the following cases, over subject matter situated within the exclusive control of the United States Government, or over parties, subjects of a foreign government, resident within the state.

19. Assault and Battery.—In an action for assault and battery in a United States Navy Yard, although the state has ceded exclusive jurisdiction of that place to the United States. (*Armstrong v. Foote*, 11 *Abb. Pr.* 384; but see *Dibble v. Clapp*, 31 *How. Pr.* 420.) So, state courts have jurisdiction of crimes committed in the United States military reservation of Fort Leavenworth. (*Clay v. State*, 4 *Kansas*, 49.) The Act of the Legislature, ceding the Navy Yard at Brooklyn to the United States—which provides that the cession "shall not prevent the operation of the laws of the State" within the same—has the effect of preserving the jurisdiction of the State over offenses committed on board a government ship in the Navy Yard, and over the person of the offender. *People v. Lane*, 1 *Edm.* 116.

20. Contracts.—State courts have jurisdiction over actions for a contract made in a foreign country. (*Skinner v. Tinker*, 34 *Barb.* 333.) So, in an action on a policy of insurance issued in the State by a resident agent of a foreign insurance company. *Burns v. Provincial Insurance Co.*, 35 *Barb.* 325; *Watson v. Cabot Bk.*, 5 *Sand.* 423.

21. Customs and Duties.—Of actions by collectors of United States customs upon receiptor's agreement; (*Sailly v. Cleveland*, 10

Wend. 156;) and of actions on bonds given for duties to the United States. *U. S. v. Dodge*, 14 *Johns.* 95.

22. Foreign Governments may sue and be sued in state courts in their federative names. *Repub. of Mex. v. Arrangois*, 11 *How. Pr.* 1; 2 *Abb. Pr.* 437; 3 *Id.* 470; *Manning v. State of Nicaragua*, 14 *How. Pr.* 517; *Delafield v. State of Illinois*, 26 *Wend.* 192; *Burrall v. Jewett*, 2 *Paige*, 134; *Gibson v. Woodworth*, 8 *Id.* 132.

23. Foreign Residents.—State courts have jurisdiction in actions against foreign executors or administrators who are residents of the State. (*Gulick v. Gulick*, 33 *Barb.* 92; 21 *How. Pr.* 22; *Montalvan v. Glover*, 32 *Barb.* 190; *Sere v. Coit*, 5 *Abb. Pr.* 482.) The courts of New York have no jurisdiction in an action at law against foreign executors or administrators. *Metcalf v. Clark*, 41 *Barb.* 45.

24. Habeas Corpus.—To discharge on *habeas corpus* persons enlisted in the United States Army. (*Re Carlton*, 7 *Cow.* 471; *Re Dabb*, 12 *Abb. Pr.* 113; *Re Phelan*, 9 *Id.* 286; *U. S. v. Wyngall*, 5 *Hill.* 16; *Re Ferguson*, 9 *Johns.* 239.) As to jurisdiction by *habeas corpus* on a commitment by a court of the United States, see *Re Barrett*, 42 *Barb.* 479; 1 *Johns. Cas.* 136; *Re Hopson*, 40 *Barb.* 34.

25. Property out of State.—Where jurisdiction of the person is acquired, state courts have equitable jurisdiction in actions respecting real estate, even if the property is situated out of the State. (*Mussina v. Belden*, 6 *Abb. Pr.* 165; *Ward v. Arredondo*, *Hoph.* 213; *Shattuck v. Cassidy*, 3 *Edw.* 152; *Slatter v. Carroll*, 2 *Sandf. Ch.* 573; *DeKlyn v. Watkins*, 3 *Id.* 185; *D'Ivernois v. Leavitt*, 23 *Barb.* 63.) They have jurisdiction in an action for a breach of covenant to convey real property situate in a foreign state. (*Mott v. Coddington*, 1 *Abb. Pr. (N.S.)* 290; *Bailey v. Rider*, 10 *N. Y.* 363; *Gardner v. Ogden*, 22 *N. Y.* 327; *Newton v. Bronson*, 13 *N. Y.* 587; *Fenner v. Sanborn*, 37 *Barb.* 610.) Thus, in the case of *Penn v. Lord Baltimore*, specific performance of a contract for lands lying in America was decreed in England. (1 *Ves.* 444.) So, in the case of the *Earl of Kildare v. Sir Morrice Eustace and Fitzgerald*, it was held that a trust in relation to lands lying in Ireland may be enforced in England, if the trustee live in England. (1 *Vern.* 419.) So, if the subject of the contract or trust be within the jurisdiction, but the parties are not. (See, also, *Arglass v. Muschamp*, 1 *Vern.* 75; *Toller v. Cateret*, 2 *Id.* 494; *Massic v. Watts*, 2 *Cranch*, 148; *Cleveland v. Burnell*, 25 *Barb.* 523; *Newbor v. Bronson*, 3 *Kiern.* 587;

Rourke v. McLaughlin, *Cal. Sup. Ct. Jul. T.*, 1869.) But the state courts have no jurisdiction of an action for *injury* to real estate out of that state. Mott v. Coddington, 1 *Abb. Pr. (N.S.)* 290; Watts v. Kinney, 6 *Hill.* 82.

26. Torts Generally.—State courts have jurisdiction of actions for torts committed in a foreign state, where the defendant is served with process within the State. So held in New York. (*Hull v. Vreeland*, 18 *Abb. Pr.* 182; *Latourette v. Clark*, 45 *Barb.* 323.) So also for a fraudulent conspiracy formed in another state. *Mussina v. Belden*, 6 *Abb. Pr.* 165.

27. United States or U. S. Officers.—The United States or a state may consent to be sued in a state court. (*The People of Mich. v. Phoenix Bk.*, 4 *Bosw.* 382. Or an action may be maintained in a state court against officers of the U. S. government in certain cases. *Ripley v. Gelston*, 9 *Johns.* 201; *Re Stacey*, 10 *Id.* 328; *Hoyt v. Gelston*, 13 *Id.* 141; *Wilson v. McKenzie*, 7 *Hill.* 95; *Teal v. Felton*, 1 *Const.* 537; *McButt v. Murray*, 10 *Abb. Pr.* 196.

28. Within the Jurisdiction of the court, means within the State. (*People v. McCauley*, 1 *Cal.* 380; *Stevens v. Irwin*, 12 *Cal.* 306.) But whenever the statute prescribes certain specific acts to be done as prerequisites to the acquiring of jurisdiction, such acts must be substantially performed in the manner prescribed. (*Steel v. Steel*, 1 *New.* 27; *Paul v. Armstrong*, *Id.* 82.) The jurisdiction of state courts extends to hearing and determining cases left pending in the late United States Territorial Courts. *Hastings v. Johnson*, 2 *New.* 190.

OF THE CONSTITUTIONAL JURISDICTION OF COURTS.

29. In the State of California, the jurisdiction of the several courts is fixed by the Constitution, which prescribes: That "the judicial powers of the State shall be vested in a Supreme Court—in District Courts—in County Courts—in Probate Courts—and in Justices of the Peace, and in such Recorders' and other inferior courts, as the Legislature may establish in any incorporated city or town." (*Const. of Cal.* Art. vi. § 1.) And each branch of the judicial department has its functions assigned. *Parsons v. Tuol. Co. Wat. and Min. Co.*, 5 *Cal.* 42.

30. That the Legislature cannot confer other than judicial functions upon any court, was held in *Burgoyne v. Supervisors of San Francisco*, 5 *Cal.* 9; which was affirmed in *Exline v. Smith*, *Id.* 113; *People v. Applegate*, *Id.* 295; *Dickey v. Hurlburt*, *Id.* 344; *Thompson v. Williams*, 6 *Cal.* 89; *People v. Town of Nevada*, *Id.* 144; *Tuolumne Co. v. Stanislaus Co.*, *Id.* 442; *Phelan v. San Francisco*, *Id.* 540; *Hardenburg v. Kidd*, 10 *Cal.* 403; *People v. Bircham*, 12 *Id.* 55; *Phelan v. San Francisco*, 20 *Id.* 42; *People v. Sanderson*, 30 *Id.* 167; but in *People v. Provines*, 34 *Cal.* 525, the case of *Burgoyne v. Supervisors of San Francisco* was commented on and overruled (*obiter dictum*).

31. Municipal and inferior courts can only be of inferior, limited, and special jurisdiction. (*Meyer v. Kalkman*, 6 *Cal.* 582; cited in *Kenyon v. Welty*, 20 *Id.* 640; *Courtwright v. Bear Riv. and Aub. Wat. and Min. Co.*, 30 *Cal.* 579.) The term "Municipal Courts," includes Mayors' and Recorders' courts. (*Uridias v. Morrill*, 22 *Cal.* 473; approved in *Uridias v. Buzee*, *Cal. Sup. Ct., Jul. T.*, 1863; and cited in *People v. Provines*, 34 *Cal.* 520.) Inferior courts cannot go beyond the power conferred upon them by statute, nor can they assume power by implication. *Winter v. Fitzpatrick*, 35 *Cal.* 269.

32. Where the statute creating a new right and a particular remedy for violation thereof, provides that the remedy must be pursued in a particular court, no other court has jurisdiction. (*Reed v. Omnibus R. R. Co.*, 33 *Cal.* 212; affirmed in *Taber v. Omnibus R. R. Co.*, *Cal. Sup. Ct., Oct. T.*, 1867; *Smith v. Omnibus R. R. Co.*, *Cal. Sup. Ct., Apl. T.*, 1868.) In such case the statute must be strictly pursued. *Cohen v. Barrett*, 5

Cal. 195. The Constitution not having defined the jurisdiction of the municipal courts authorized to be established, it is left to be regulated by the Legislature under its general powers. *Uridias v. Morrill*, 22 *Cal.* 473.

I. THE SUPREME COURT.

33. It is prescribed by the Constitution of the State of California, that the Supreme Court shall consist of a Chief Justice and four associate justices. The presence of three justices shall be necessary to the transaction of business, except such as may be done at chambers; and the concurrence of three shall be necessary to pronounce a judgment. *Const. of Cal.* Art. vi. § 2; see *People v. Wells*, 2 *Cal.* 202.

34. The judges of this court are elected by the qualified electors of the State, at a separate or judicial election, and shall hold office for the term of ten years. They are so classified that one justice goes out of office every two years, and each of the justices acts as chief justice for the last two years of his term of office. *Const. of Cal.* Art. vi. § 3; *People v. Wells*, 2 *Cal.* 202; *People v. Langdon*, 8 *Id.* 16; cited as to term of office in *People v. Whitman*, 10 *Id.* 46.

JURISDICTION OF THE SUPREME COURT.

35. The Supreme Court has appellate jurisdiction: *First*, In all cases in equity. *Second*, In all cases at law involving the title or possession of real estate. *Third*, In all cases affecting the legality of any tax, toll, impost, assessment or municipal fine. *Fourth*, In all matters in which the demand, exclusive of interest, exceeds the sum of three hundred dollars. *Fifth*, In

all cases where the value of the property in dispute exceeds the sum of three hundred dollars. *Sixth*, In all cases arising in the probate courts. *Seventh*, In all criminal cases amounting to felony, on questions of law alone. *Eighth*, The Supreme Court has power to issue writs of *mandamus*, *certiorari*, *prohibition*, and *habeas corpus*. *Ninth*, And, also, all writs necessary for the complete exercise of its appellate jurisdiction. *Const. of Cal.* Art. vi. § 4.

36. The Supreme Court is clothed, by the Constitution, with the powers and jurisdiction of the court of King's Bench, in England. *Ex parte*, Attorney-General 1 *Cal.* 85.

JURISDICTION APPELLATE.

37. This court has no other than appellate jurisdiction, except in writs of *certiorari*, *mandamus*, *prohibition* and *habeas corpus*. (*Caulfield v. Hudson*, 3 *Id.* 389; affirmed in *Reed v. McCormick*, 4 *Cal.* 342; *Parsons v. Tuolumne*, 5 *Id.* 43; *Townsend v. Brooks*, *Id.* 52; *Zander v. Coe*, *Id.* 230; *People v. Applegate*, *Id.* 295; cited in *People v. Hester*, 6 *Id.* 681; sustained in *People v. Fowler*, 9 *Id.* 86.) It has appellate jurisdiction in all cases—*provided*, that when the subject matter is capable of pecuniary compensation, the matter in dispute must exceed in value three hundred dollars; unless the legality of a tax, toll, impost, or municipal fine is in question. (*Conant v. Conant*, 10 *Cal.* 249; approved in *Perry v. Ames*, 26 *Cal.* 386; *People v. Rosborough*, 29 *Cal.* 418; *Courtwright v. Bear Riv. and Aub. Wat. and Min. Co.*, 30 *Cal.* 579; affirmed in *Knowles v. Yeates*, 31 *Id.* 84; *Dumphy v. Guindon*, 13 *Id.* 30.) So in cases of divorce. (*Conant v. Conant*, 10 *Cal.* 249.) So in cases of con-

tested elections on appeal from county courts. (*Middleton v. Gould*, 5 *Cal.* 190; *Knowles v. Yeates*, 31 *Id.* 82; affirmed in *Day v. Jones*, *Id.* 263.) On questions of fraud made in petition of insolvent debtor. *Fisk v. His Creditors*, 12 *Id.* 281; approved in *People v. Shepard*, 28 *Id.* 115; *People v. Rosborough*, 29 *Cal.* 418.

38. The Supreme Court may exercise its appellate jurisdiction in criminal cases confined to felony. (*People v. Applegate*, 5 *Cal.* 295; affirmed in *People v. Vick*, 7 *Id.* 165; *People v. Johnson*, 30 *Id.* 101; *People v. Shear*, 7 *Id.* 139; *People v. Fowler*, 9 *Id.* 86; *People v. Apgar*, 35 *Cal.* 389; see, also, *People v. Cornell*, 16 *Id.* 187; *People v. War*, 20 *Id.* 117; *People v. Burney*, 29 *Id.* 459; *People v. Jones*, 31 *Id.* 576.) The question whether the Supreme Court has jurisdiction to review criminal cases upon questions of fact, raised, but not decided. *People v. Dodge*, 30 *Cal.* 455.

39. In actions for damages to real property when the question of title is involved it has appellate jurisdiction, although the damages claimed are less than three hundred dollars. *Doherty v. Thayer*, 31. *Cal.* 140.

AMOUNT IN CONTROVERSY.

40. Its appellate jurisdiction extends to all cases in which the demand in controversy in the court below exceeds the sum of three hundred dollars. (*Luther v. Master and Owners of Ship "Apollo,"* 1 *Cal.* 15; *Doyle v. Seawall*, 12 *Cal.* 280; *Simmons v. Brainard*, 14 *Id.* 278; *Poland v. Carriaga*, 20 *Id.* 174; *Malson v. Vaughn*, 23 *Id.* 61; *Skillman v. Lachman*, 23 *Id.* 198; *Bolton v. Landers* (No. 2), 27 *Id.* 106; *Hopkins v. Cheeseman*,

28 *Id.* 180; cited in *Winter v. Fitzpatrick*, 35 *Cal.* 269; *Maxfield v. Johnson*, 30 *Id.* 545; affirmed in *Solomon v. Reese*, 34 *Cal.* 34.) The amount sued for being the test of the jurisdiction. *Maxfield v. Johnson*, 30 *Id.* 545; *Solomon v. Reese*, 34 *Cal.* 34.

41. The words, "matter in dispute," in Art. vi., § 4, of the Const. of California, mean the subject of litigation, the matter for which suit is brought. *Dumphy v. Guindon*, 13 *Cal.* 28; affirmed in *Meeker v. Harris*, 23 *Cal.* 286; *Bolton v. Landers*, 27 *Cal.* 107; *Gillespie v. Benson*, 18 *Cal.* 409; *Zabriskie v. Torrey*, 20 *Cal.* 174; *Votan v. Reese*, 20 *Cal.* 91; *Skillman v. Lachman*, 23 *Cal.* 202.

42. If an appeal is taken by the plaintiff from a judgment in his favor, then the amount in dispute is the difference between the amount of the judgment and the sum claimed by the complaint. (*Skillman v. Lachman*, 23 *Cal.* 198.) But if the judgment is for the defendant, the jurisdiction of the Supreme Court is determined by the amount claimed in the complaint. *Id.*

43. If the appeal is taken by defendant from a judgment in his favor, where he set up a counter-claim, the amount in dispute is the difference between the amount of the judgment, exclusive of costs, and the sum claimed in his counter-claim. The interest due forms no part of the amount in dispute; so also costs constitute no part thereof. *Dumphy v. Guindon*, 13 *Cal.* 28; *Votan v. Reese*, 20 *Id.* 89; *Zabriskie v. Torrey*, *Id.* 173; *Maxfield v. Johnson*, 30 *Cal.* 545.

44. Where plaintiff had judgment against defendant for six hundred dollars, and defendant had judgment in the same court, in another action, for one hundred and

ten dollars, a motion by plaintiff that defendant's judgment be set off against plaintiff's judgment, was denied, from which plaintiff appeals. *Held*, that the Supreme Court had no jurisdiction, the judgment sought to be set off being less than three hundred dollars. *Crandall v. Blen*, 15 *Cal.* 407.) The fact that defendant sets up a counter-claim in excess of three hundred dollars, does not give jurisdiction on appeal. *Maxfield v. Johnson*, 30 *Cal.* 545.

ITS ORIGINAL JURISDICTION.

45. The Supreme Court has original jurisdiction to issue writs of *mandamus*, *certiorari*, *prohibition* and *habeas corpus*. (*Am. Const. of Cal.* Art. vi. § 4; *Ex parte* Attorney-General, 1 *Cal.* 87; *Warner v. Hall*, *Id.* 90; affirmed in *Warner v. Kelly*, *Id.* 91; *Tyler v. Houghton*, 25 *Id.* 28; affirmed in *Miller v. Board of Supervisors Sac. Co.*, *Id.* 93; *People v. Loucks*, 28 *Id.* 71; *Courtwright v. Bear Riv. and Aub. Wat. and Min. Co.*, 30 *Id.* 585; see, also, *Perry v. Ames*, 26 *Id.* 383.) It may exercise its *appellate* jurisdiction by means of the writs of *certiorari*, *mandamus*, or *prohibition*. (*People v. Turner*, 1 *Cal.* 143; *White v. Lighthall*, *Id.* 347; *Purcell v. McKune*, 14 *Id.* 230; approved in *Flagley v. Hubbard*, 22 *Cal.* 38; see, also, *Miliken v. Huber*, 21 *Id.* 169; *Lewis v. Barclay*, 35 *Cal.* 213; approving *People v. Weston*, 28 *Id.* 639.) But only in cases where there has been an excess of jurisdiction in the court below. (*Coulter v. Stark*, 7 *Cal.* 244; *Miller v. Board Supervisors Sac. Co.*, 25 *Id.* 93; *People v. Johnson*, 30 *Id.* 98.) It may issue *all* writs necessary or proper for the exercise of its appellate jurisdiction. *Adams v. Town*, 3 *Cal.* 247; *Cowell v. Buckelew*, 14 *Cal.* 642.

46. Its jurisdiction upon writs is co-extensive with the State. Consult *Haight v. Gay*, 8 *Cal.* 300; cited in *Miliken v. Huber*, 21 *Cal.* 169; see, also, *Conant v. Conant*, 10 *Cal.* 253; approved in *Perry v. Ames*, 26 *Cal.* 386; *People v. Rosborough*, 29 *Cal.* 418; *Courtwright v. B. R. & A. W. & M. Co.*, 30 *Cal.* 579; affirmed in *Knowles v. Yeates*, 31 *Cal.* 84; and *Dumphy v. Guindon*, 13 *Cal.* 30; see, also, *Sac. Placer and Nev. R. R. Co. v. Harlan*, 24 *Cal.* 336; affirmed in *S. F. and S. J. R. R. Co. v. Mahoney*, 29 *Cal.* 115; see *Day v. Jones*, 31 *Cal.* 261; and *Solomon v. Reese*, 34 *Cal.* 28.

47. The Supreme Court loses jurisdiction over a case after the *remittitur* is issued, and the term at which the judgment was rendered has passed. (*Davidson v. Dallas*, 15 *Cal.* 75.) Or after the *remittitur* has been filed in the court below. *Mateer v. Brown*, 1 *Cal.* 221; affirmed in *Blanc v. Bowman*, 22 *Id.* 23; *Rowland v. Kreyenhagen*, 24 *Cal.* 58.

48. The power which the Judiciary possesses to declare a law unconstitutional comprehends the necessary authority of carrying its judgments into effect. *Nouges v. Douglas*, 7 *Cal.* 65; cited without comment in *McCauley v. Brooks*, 16 *Cal.* 43.

II. OF THE DISTRICT COURTS.

49. The State of California is now divided into seventeen judicial districts (*People v. Sassovich*, 29 *Cal.* 483), in each of which there is a District Court. The judges thereof are elected by the qualified voters of the district at special judicial elections, and hold office for the term of six years. *People v. Mott*, 3 *Cal.* 505; approved in *People v. Mizner*, 7 *Cal.* 523; see, also,

People *v.* Whitman, 10 *Cal.* 38; commented on in Perkins *v.* Thornburgh, *Id.* 191; Saunders *v.* Haynes, 13 *Id.* 153; considered doubtful in Brooks *v.* Malony, 15 *Id.* 58; see also People *v.* Weller, 11 *Id.* 85; People *v.* Burbank, 12 *Cal.* 387.

50. The Legislature of the State has no power to grant a leave of absence from the State to a judicial officer; and any district judge who absents himself from the State for the period of thirty consecutive days, forfeits his office. Art. vi. § 5, *Const. of Cal.*

51. The Constitution does not require district courts to be held at the county seat. (Upham *v.* Sutter Co., 8 *Cal.* 378.) The district judge has power to hold a court in another district. People *v.* McCauley, 1 *Cal.* 379; approved in People *v.* Wells, 2 *Cal.* 207.

52. As to the terms of the district courts, see *Laws of Cal.* 1853; Dominguez *v.* Dominguez, 4 *Cal.* 186.

53. The district courts have *original* jurisdiction: *First*, In all cases in equity, and, *Second*, In all cases at law which involve the title or possession of real property. *Third*, The legality of any tax, toll, impost, assessment, or municipal fine. *Fourth*, In all cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars. *Fifth*, In all criminal cases where the indictment is for murder or arson. *Sixth*, The district courts and their judges shall have power to issue writs of *habeas corpus*, on petition by, or in behalf of any person held in actual custody in their respective districts. *Const. of Cal.* Art. vi. § 6; Hicks *v.* Bell, 3 *Cal.* 219.

54. In actions for the recovery of money the District Court has jurisdiction, if the sum sued for amounts to three hundred dollars, exclusive of interest, regardless of the sum for which judgment may be obtained. (Solomon *v.* Reese, 34 *Cal.* 28.) Where the principal sum sued for is less than two hundred dollars (now three hundred dollars) the District Court has no jurisdiction. Arnold *v.* Van Brunt, 4 *Cal.* 89.

55. Section 6 of Art. vi. of the Constitution gives the district courts jurisdiction in all actions in which the title or possession of real property is an issuable fact in the case. It is not necessary that title or possession be put in issue, but one or the other must be an issuable fact necessary to be averred in the pleadings. And this, regardless of the sum sued for. Cullen *v.* Langridge, 17 *Cal.* 67; approved in Henderson *v.* Allen, 23 *Cal.* 520.

56. The character of the action is to be determined by the prayer of the complaint. If the prayer asks for a money judgment, it is an action at law; if it asks for the foreclosure of a lien, order of sale, etc., it is a suit in equity. In the former the District Court has no jurisdiction where the amount is less than three hundred dollars, and the *ad damnum* clause is the test. (Maxfield *v.* Johnson, 30 *Cal.* 545; Solomon *v.* Reese, 34 *Cal.* 28;) in the latter it has jurisdiction, regardless of the amount claimed. People *v.* Mier, 24 *Cal.* 61; affirmed in Bell *v.* Crippen, 28 *Cal.* 328; Courtwright *v.* Bear Riv. and Aub. Wat. and Min. Co., 30 *Cal.* 581; Mahlstadt *v.* Blanc, 34 *Cal.* 580;

57. The court below loses all power over a cause in which it has rendered judgment, upon the adjournment

of the term, and cannot disturb its judgments except in cases provided by statute. *Suydam v. Pitcher*, 4 *Cal.* 280; affirmed in *Carpentier v. Hart*, 5 *Cal.* 407; *Shaw v. McGregor*, 8 *Id.* 521; *De Castro v. Richardson*, 25 *Id.* 52; *Casement v. Ringgold*, 28 *Id.* 338; see, also, *Whipley v. Dewey*, 17 *Id.* 314.

58. District courts have no appellate jurisdiction. *People v. Peralta*, 3 *Cal.* 379; *Canfield v. Hudson*, *Id.* 389; *Hernandes v. Simon*, *Id.* 464; *Gray v. Schupp*, 4 *Id.* 185; *Reed v. McCormick*, *Id.* 342; affirmed in *Parsons v. Tuol. Wat. Co.*, 5 *Cal.* 43; *Keller v. Franklin*, *Id.* 434; *Becket v. Selover*, 7 *Id.* 240; and *People v. Fowler*, 9 *Id.* 86; *Townsend v. Brooks*, 5 *Id.* 52; *Zander v. Coe*, 5 *Id.* 230; *People v. Applegate*, *Id.* 295; affirmed in *People v. Vick*, 7 *Cal.* 166; *People v. Johnson*, 30 *Id.* 101; *People v. Shear*, 7 *Cal.* 140; *People v. Apgar*, 35 *Cal.* 389.

59. The District Court is a court of general original jurisdiction; its process is co-extensive with the State (*Reyes v. Sanford*, 5 *Cal.* 117), and the regularity of its proceedings is presumed. (*People v. Robinson*, 17 *Cal.* 363; approved in *People v. Robinson*, 27 *Cal.* 67; *People v. Judge 10th Jud. Dist.*, 9 *Id.* 19.) As to the power of supervision of district courts over inferior tribunals, see *Miliken v. Huber*, 21 *Cal.* 166.

60. A district judge, while sitting in an equity case, is possessed of all the powers of a court of chancery. (*Sanford v. Head*, 5 *Cal.* 297; *People v. Davidson*, 30 *Cal.* 380; approved in *Courtwright v. B. R. & A. W. & M. Co.*, 30 *Cal.* 585; *Mahlstadt v. Blanc*, 34 *Cal.* 577.) So in cases of nuisance. *Courtwright v. B. R. and Auburn Wat. and Mining Co.*, 30 *Cal.* 585.

61. Criminal Jurisdiction.—The criminal jurisdiction of district courts is confined to cases of felony. *People v. Fowler*, 9 *Cal.* 87.

62. Divorce.—In suit for a divorce, and partition of the property acquired during coverture, the jurisdiction of the District Court is not limited as to the amount. (*Deuprez v. Deuprez*, 5 *Cal.* 387.) District courts have jurisdiction to decree relief in alimony to the wife, in a separate action, unconnected with a suit for divorce. (*Galland v. Galland*, *Cal. Sup. Ct. Jul. T.* 1869; citing *Purcell v. Purcell*, 4 *Hen. & Munf.* 507; *Almond v. Almond*, 4 *Rand.* 662; *Logan v. Logan*, 2 *B. Monr.* 142; *Prather v. Prather*, 4 *Desares* 33; *Rhame v. Rhame*, 1 *McCord Ch. R.*; *Glover v. Glover*, 16 *Ala.* 446.) Or, to enforce an agreement for separation and alimony in connection. (*Galland v. Galland*, *Cal. Sup. Ct. Jul. T.* 1869.) And, in general, whenever the wife is entitled to live separate from her husband, by reason of breaches of matrimonial duty committed by him, a concurring adjudication must be pronounced that he support her while so living. 2 *Story's Eq. Jur.* §§ 1,422, 1,424; *Fiscole v. Fiscole*, 1 *Blackf.* 365; *Chapman v. Chapman*, 13 *Ind.* 397; *Shannon v. Shannon*, 2 *Gray* 285; *Leafe v. Leafe*, 4 *Foster* 567; *Parsons v. Parsons*, 9 *N.H.* 309; *Lawson v. Shotwell*, 27 *Miss.* 633; *Doyle v. Doyle*, 26 *Mo.* 549; *Yule v. Yule*, 2 *Stock.* 143; *Covey v. Covey*, 3 *Id.* 400; *McGee v. McGee*, 10 *Geo.* 482; *Peltier v. Peltier*, *Harringt. (Mich.) Ch. R.* 29.

63. Forcible Entry.—In Nevada, district courts have jurisdiction in actions of forcible entry and unlawful detainer. (*Hoopes v. Meyer*, 1 *Nev.* 433.) In California that jurisdiction is conferred on the county courts. *Const. of Cal.*, Art. vi. § 8.

64. Fugitives.—State courts of general original jurisdiction, exercising the usual powers of common law courts, are fully competent to hear and determine all matters, and to issue all necessary writs for the arrest and transfer of fugitive criminals to the authorized agent of the state from which they fled, without any special legislation. *In re Romaine*, 23 *Cal.* 585.

65. Mining Claims.—Although jurisdiction of mining claims is given to justices of the peace, that of the District Court remains unaffected, if the amount in controversy exceeds two hundred dollars (now three hundred dollars). *Hicks v. Bell*, 3 *Cal.* 219; *Freeman v. Powers*, 7 *Id.* 104.

66. Mining Co-partnerships.—In suit for recovery of partner's share of gold extracted from mining claim. *Schuepler v. Evans*, 4 *Cal.* 212.

67. Nuisance.—Under the Constitution, district courts have jurisdiction in cases of nuisance. The grant of the Legislature, of jurisdiction in such cases, to the county courts, cannot take away the jurisdiction given to the District Court by the Constitution. *Fitzgerald v. Urton*, 4 *Cal.* 235; *Courtwright v. Bear Riv. and Aub. Wat. and Min. Co.*, 30 *Cal.* 573.

68. Partition.—The district courts have jurisdiction of actions to recover one half the value of a partition fence, although the amount sought to be recovered is less than three hundred dollars—such action involving title to land. *Holman v. Taylor*, 31 *Cal.* 338.

69. Probate.—The district courts have the same control over the persons of minors, as well as their estates, that the courts of chancery in England possess. This jurisdiction is conferred by the Constitution, and cannot be divested by any legislative enactment. The claim of exclusive original jurisdiction in the courts of probate over the same subject matter is unfounded. (*Wilson v. Roach*, 4 *Cal.* 362; approved in *Belloc v. Rogers*, 9 *Cal.* 129; *Clark v. Perry*, 5 *Cal.* 58; *Griggs v. Clark*, 3 *Cal.* 429.) The Court of Chancery has inherent jurisdiction in an administration suit to appoint trustees, where none have been appointed by the administrator. (*Dodkin v. Brunt*, *Law Rep.* 6 *Eq.* 580.) This jurisdiction of the district courts does not, however, apply to the administration of estates.

70. It is a favorite rule in equity, that when a court of chancery gains jurisdiction of a case for one purpose, it will retain it for others, and not do justice by halves, and thus foster a multiplicity of suits. (*Belloc v. Rogers*, 9 *Cal.* 129; approved in *Hentsch v. Porter*, 10 *Cal.* 559; *Willis v. Farley*, 24 *Cal.* 499.) These decisions are affirmed in *Griggs v. Clark*, 23 *Cal.* 429, where it reiterates that "the jurisdiction vested in the Probate Court does not divest the district courts of their general jurisdiction as courts of chancery over certain actions.

71. Taxes—in Action at Law.—An action brought before the Revenue Act of 1861, to recover judgment for unpaid taxes, is not a case in equity, but an action at law, and where the amount is less than three hundred dollars the District Court has no jurisdiction. *People v.*

Mier, 24 *Cal.* 61; affirmed in *Bell v. Crippen*, 28 *Id.* 327; *Courtwright v. Bear Riv. and Aub. Wat. and Min. Co.*, 30 *Cal.* 581; and *Mahlstadt v. Blanc*, 34 *Id.* 580.

72. Taxes—in Equity.—If, however, the action is brought under the provisions of the Act of May 12th, 1862, it is a case in equity, and the District Court has jurisdiction, although the amount claimed is less than three hundred dollars. *Bell v. Crippen*, 28 *Cal.* 327.

73. Trespass, Damages for.—District courts have jurisdiction in all actions to recover damages for trespass upon lands, regardless of the amount of damages claimed. *Id.*

74. Writs, Issuance of.—District courts have power to issue writs of *certiorari*, *habeas corpus*, *mandamus*, and *prohibition*. (*Clary v. Hoagland*, 5 *Cal.* 476; *Chard v. Harrison*, 7 *Id.* 113; *People v. Board Sup. El Dorado Co.*, 8 *Cal.* 58; *People v. Board Sup. Marin Co.*, 10 *Id.* 344; approved in *Kalkman v. Baylis*, 23 *Cal.* 303; see, also, *Hastings v. San Francisco*, 18 *Id.* 49; *Murray v. Mariposa Co.*, 23 *Id.* 492; *Perry v. Ames*, 26 *Cal.* 381; approved in *Knowles v. Yeates*, 31 *Cal.* 90; *Courtwright v. Bear Riv. and Aub. Wat. and Min. Co.*, 30 *Id.* 573; and *Cariaga v. Dryden*, 30 *Cal.* 244.) *Certiorari does not lie where an appeal will lie.* *People v. Shepard*, 28 *Cal.* 115.

III. OF COUNTY COURTS.

75. There shall be in each of the organized counties of the State a county court, for each of which a county judge shall be elected by the qualified electors of the county, at the special judicial elections to be held, as provided for the election of justices of the Supreme Court by § 3 of this Article. The county judges shall hold their offices for the term of four years from the first day of January next after their election. Said courts shall also have power to issue naturalization papers. In the City and County of San Francisco, the Legislature may separate the office of Probate Judge from that of County Judge, and may provide for the election of a probate

judge, who shall hold his office for the term of four years. *Const. of Cal.* Art. vi. § 7.

JURISDICTION OF COUNTY COURTS.

76. The county courts shall have *original* jurisdiction. *First*, Of actions of forcible entry and detainer. *Second*, of proceedings in insolvency. *Third*, Of actions to prevent or abate a nuisance. *Fourth*, Of all such special cases and proceedings as are not otherwise provided for, and also, *Fifth*, Such criminal jurisdiction as the legislature may prescribe. They shall have *appellate* jurisdiction in all cases arising, *First*, In courts held by justices of the peace and recorders; and, *Second*, In such inferior courts as may be established in pursuance of section second of this article, in their respective counties. *Const. of Cal.* Art. vi. § 8.

77. The true construction of our Constitution, Article vi. Section nine (now eight), is that the Legislature has power to confer on county courts jurisdiction of such specially enumerated and defined cases, as in its discretion shall be confided to those tribunals. *Jacks v. Day*, 15 *Cal.* 91.

78. The jurisdiction conferred on county courts is both appellate and original. It is appellate as to cases arising in justices courts, and in special cases arising from the action of boards or officers exercising judicial or *quasi* judicial functions; the extent of such jurisdiction being such "as the Legislature may prescribe." So, also, appeals may be taken to the County Court from the action of commissioners or boards of supervisors, in awarding damages where private property is taken for

public uses. (See Act concerning Roads and Highways, *Cal. Laws* 1860, § 6.) And from action of the Board of Town Trustees in the execution of the trust imposed by the acts of Congress and the legislation of the State, in the disposition of the lands entered by them. This jurisdiction is not strictly appellate, though nominally so. *Ricks v. Reed*, 19 *Cal.* 572; commented on and approved in *Ryan v. Tomlinson*, 31 *Cal.* 15.

TERMS OF COURT.

79. Where a special term of the County Court was held on the first day of May, upon notice to that effect given on the twenty-fourth of April preceding, the proceedings of the Court were irregular if not void; the statute requiring a notice of not less than ten, nor more than twenty days. *Orman v. Riley*, 16 *Cal.* 186.

80. The trial of a cause to determine an election contest had been set for November 20th, 1866, in the County Court of Tuolumne County, for which day a special term of court to try said cause had been regularly called. Before that day, on motion of plaintiff founded on affidavit, and on notice to the respondent, the judge at chambers, granted an order continuing the trial to December 3rd, 1866; respondent objecting, and excepting thereto. The last named day was not embraced in a regular term of court, nor had any special term been called for that date. On the said 20th of November, the court was not called, but on the 3rd day of December, the County Judge called the court, and assuming to hold said court, both parties appearing, tried and rendered judgment in said cause. *Held*, that on said 3rd of December there was no legal term of

court, and that trial and judgment were null and void. *Norwood v. Kenfield*, 34 *Cal.* 329.

81. It is absolutely essential to the validity of a judgment that it be rendered by a court of competent jurisdiction, at the time and the place, and in the form prescribed by law. The tribunal before which the trial was had was in no legal sense a court, nor could any consent of parties to the trial confer jurisdiction. *Id.*

TERM OF OFFICE.

82. The legislature may fix the commencement of the term, and also the time of election of a county judge, but an act limiting the term to anything less than four years is void *pro tanto*. *Westbrook v. Rosborough*, 14 *Cal.* 180.

83. Where an incumbent resigns before the expiration of his term, there is a vacancy to be filled by the Governor; and his appointee holds till the next general election, and until his successor qualifies. (*Westbrook v. Rosborough*, 14 *Cal.* 180.) An election to fill such vacancy is a special election, and the Governor's proclamation is essential to its validity. *Id.*

84. Under the act to reorganize San Mateo County (*Laws* 1857, p. 222), an election was held, and Fox was elected County Judge, there being no proclamation of the Governor for the election. At the general election in 1858, an election was held pursuant to proclamation, and Templeton was elected to the same office. *Held*, that Fox was entitled to the office for a term of four years, commencing from the time of his assumption of the office. *Fox v. Templeton*, 12 *Cal.* 394.

GENERAL PROVISIONS.

85. Appellate Jurisdiction.—County courts have sole appellate jurisdiction, in all cases, civil and criminal, arising in justices courts, subject to such restrictions as the Legislature may impose. *People v. Fowler*, 9 *Cal.* 85; approved in *People v. Johnson*, 30 *Cal.* 101.

86. Change of Names of Persons.—The county courts are authorized to change the names of persons. *Laws of Cal.* 1865–6, p. 103.

87. Criminal Jurisdiction.—County courts are courts of general criminal jurisdiction, and as such all intendments are in favor of the regularity of their proceedings. (*People v. Fowler*, 9 *Cal.* 85; *People v. Blackwell*, 27 *Cal.* 65.) Thus, in all cases of misdemeanor, the judgment of the County Court is final, except where there has been an excess of jurisdiction. *People v. Burney*, 29 *Cal.* 459; *People v. Johnson*, 30 *Id.* 98.

88. Forcible Entry and Detainer.—The new county courts, as organized under the amended Constitution, have authority to proceed, try, and determine appeals, in cases of forcible entry and detainer pending in the old county courts on the last day of December, 1863. *McMinn v. Bliss*, 31 *Cal.* 122.

89. Incorporation of Towns.—The power of incorporating towns is a legislative function which cannot be exercised by the Judiciary. *People v. Nevada*, 6 *Cal.* 143.

90. Injunctions.—The County Judge may grant an injunction in cases in the district courts; but he cannot appoint a receiver, at least not as a thing distinct from the injunction. (*Ruthrauff v. Kresz*, 13 *Cal.* 639.) The grant of authority to county judges to award injunctions in cases brought in district courts is not trenching upon the limits of the jurisdiction of any of the courts; it is a mere power to issue process auxiliary to the proper jurisdiction of the district courts. *Thompson v. Williams*, 6 *Cal.* 88.

91. Mandamus.—County courts have jurisdiction in proceedings by *mandamus*, and the statute is constitutional. (*Jacks v. Day*, 15 *Cal.* 91.) But if notice of appeal is given from an order of the Justice of the Peace, the County Court has no jurisdiction to compel the Justice

of the Peace, by writ of mandate, to send up the appeal papers. *People v. Halloway*, 26 Cal. 651.

92. Naturalization.—The county courts shall have power to issue naturalization papers. The county judges shall also hold in the several counties probate courts, and perform such duties, as probate judges, as may be prescribed by law. They shall also have power to issue writs of *habeas corpus* within their respective counties. *Const. of Cal.*, Art. vi. §§ 7, 8.

93. Writs, Issuance of.—By the Act of April 20th, 1852, the power of hearing and determining writs of *habeas corpus* is vested in the judge of every court of record in the State. (*Matter of Perkins*, 2 Cal. 424; consult also *Matter of Ring*, 28 *Id.* 251.) The Judiciary have jurisdiction, by *habeas corpus*, to investigate cases where a party is arrested, as a fugitive from justice, escaped from another state. *Matter of Manchester*, 5 *Id.* 237.

IV. OF PROBATE COURTS.

94. The Legislature may separate the office of probate judge from that of county judge, and may provide for the election of a probate judge, who shall hold office for the term of four years. Art. vi. § 7, *Const. of Cal.*

95. In each county in the State there shall be a probate court. The County Judge in each county, except in the City and County of San Francisco, shall be judge of the Probate Court. In said City and County, a probate judge shall be elected by the qualified voters thereof, at the time and in the manner provided for the election of the County Judge. He shall enter upon the duties of his office on the first day of January next after his election, and shall hold office for the term of four years. He shall be commissioned by the Governor, and before entering upon his duties, shall take the constitutional oath of office. And in case of vacancy in the office of probate judge of said City and County,

the Governor shall fill the same by granting a commission, which shall continue until the election and qualification of a judge in his place. *Laws of 1863*, p. 333, § 43.

OF THE JURISDICTION OF PROBATE COURTS.

96. The Probate Court shall have power: *First*, To open and receive the proof of last wills and testaments, and to admit them to probate. *Second*, To grant letters testamentary, of administration, and of guardianship; and to revoke the same for cause shown according to law. *Third*, To compel executors, administrators, and guardians to render an account when required, or at the period fixed by law. *Fourth*, To order the sale of property of estates, or property belonging to minors. *Fifth*, To order the payment of debts due by estates. *Sixth*, To order and regulate all partitions of property, or estates of deceased persons. *Seventh*, To compel the attendance of witnesses. *Eighth*, To appoint appraisers or arbitrators. *Ninth*, To compel the production of title deeds, papers, or other property of an estate, or of a minor. *Tenth*, To make such other orders as may be necessary and proper, in the exercise of the jurisdiction conferred upon it. *Laws of 1863*, p. 333.

97. The facts of the death of the intestate, and of his residence within the county, are foundation facts upon which all the subsequent proceedings of the Court must rest. *Haynes v. Meeks*, 10 *Cal.* 110; approved in *Townsend v. Gordon*, 19 *Id.* 205; *Estate of Harlan*, 24 *Id.* 182.

98. Letters of administration upon an estate, granted by the Probate Court, cannot be collaterally attacked,

by showing that the last residence of the deceased was not in that county, and therefore that the court had no jurisdiction. *Irwin v. Scriber*, 18 *Cal.* 499; affirmed in *Halleck v. Moss*, 22 *Cal.* 276.

99. Where S. dies out of the State, leaving property in Santa Clara County, and the Probate Court thereof takes jurisdiction of the estate and grants letters of administration to K.;—the widow subsequently files a petition to revoke the letters on the ground that the Probate Court of San Francisco ought to have issued them, whereupon the administrator asks the Court to transfer the cause to that Court, representing that the widow and a majority of the witnesses reside there and that the interest of several persons, interested in the estate, would be advanced by the transfer, to which both parties agreed;—the Court made an order to transfer. The Probate Court of San Francisco, on the papers being filed therein, refused to take jurisdiction of the cause, and ordered the papers back. *Held*, that the Probate Court of Santa Clara could not divest itself of jurisdiction, and vest it in the Probate Court of San Francisco; and that *mandamus* will not issue to compel the latter court to take jurisdiction. *Estate of Scott*, 15 *Cal.* 220.

100. Probate courts have no jurisdiction to administer upon the estates of deceased persons, who died prior to the adoption of the Constitution. *Downer v. Smith*, 24 *Cal.* 114; commented on in *People v. Senter*, 28 *Id.* 505; and approved in *Coppinger v. Rice*, 33 *Id.* 423.

101. Estates of deceased persons in this State, who died prior to the passage of the Probate Act of 1850, and subsequent to the adoption of the common law, can

be administered on in accordance with the provisions of the probate acts in force. In the following decisions (*Clarke v. Perry*, 5 *Cal.* 58; *Grimes Estate v. Norris*, 6 *Id.* 621; *Smith v. Andrews*, *Id.* 652; and *Haynes v. Meeks*, 10 *Id.* 110), it was held that probate courts were courts of inferior or limited jurisdiction, and not invested with plenary powers; but the law in this respect has been changed. See *Statutes of 1858*, p. 95; *Irwin v. Scriber*, 18 *Cal.* 499; *Townsend v. Gordon*, 19 *Id.* 188.

102. The proceedings of probate courts, within the jurisdiction conferred on them by the laws, shall be construed in the same manner and with like intendments, as the proceedings of courts of general jurisdiction; and the records, orders, judgments and decrees of said probate courts, shall have accorded to them like force and effect, and legal presumptions as the records, orders, judgments and decrees of the district courts. *Laws of 1858*, p. 95.

103. When the Probate Court has jurisdiction of the subject matter, all intendments are, under the statutes, in favor of the correctness of the action of the Court, the same as in other courts of record. (*Lucas v. Todd*, 28 *Cal.* 182.) The same presumptions as to jurisdiction attach to the proceedings of probate courts, within the jurisdiction conferred on them by law, as in the case of district courts. *Irwin v. Scriber*, 18 *Cal.* 499.

JURISDICTION NOT EXCLUSIVE.

104. The district courts of this State have the same control over the estates and persons of minors that the courts of chancery in England possess. This jurisdiction is conferred by § 6, Art. vi. of the Constitution of

California, and cannot be divested by any legislative enactment, and the claim of exclusive original jurisdiction in probate courts over the same subject matter is unfounded. *Wilson v. Roach*, 4 *Cal.* 362; approved in *Belloc v. Rogers*, 9 *Cal.* 129; and *Griggs v. Clark*, 23 *Id.* 427.

105. But since the adoption of the constitutional amendments of 1862, district courts have no jurisdiction to try issue framed in probate courts; and sections twenty, and two hundred and ninety four, of the Probate Act have become inoperative. *Estate of Tomlinson*, 35 *Cal.* 509.

106. In Nevada, the Probate Court has the power to issue the writ of restitution in an action brought before it on *certiorari*. *Paul v. Armstrong*, 1 *Nev.* 82.

V. OF JUSTICES' COURTS.

107. The Legislature shall determine the number of justices of the peace to be elected in each city and township of the State, and fix by law their powers and responsibilities. *Const. of Cal.* Art. vi. § 9.

108. They shall have jurisdiction of the following actions, and proceedings, where the amount in controversy, exclusive of interest, is less than three hundred dollars: *First*, Of an action on contract for money only. *Second*, Of an action for damages for injury to the person, or for taking or detaining personal property, or for injury to real or personal property. *Third*, Of an action for a fine, penalty, or forfeiture, given by statute or ordinance. *Fourth*, Of an action on a bond or undertaking, for the payment of a sum less than three

hundred dollars, though the penalty exceed that sum. *Fifth*, Of an action for the preclosure of any mortgage or the enforcement of any lien on personal property. *Sixth*, Of an action to recover possession of personal property. *Seventh*, To take and enter judgment by confession. *Eighth*, Of an action to determine the right of a mining claim. *Ninth*, Of proceedings respecting vagrancy and disorderly persons. *Stat. of Cal.* 1864, pp. 67-8.

109. The jurisdiction of courts of justices of the peace shall not extend to a civil action, in which the title or possession of real property shall come in question; nor to an action or proceeding against ships, vessels or boats, or the owners or masters thereof, when the proceeding is for seaman's wages for a voyage performed, in whole or in part, without the waters of this State. *Stat. of Cal.* 1858, p. 95.

110. A justice of the peace has no power to vacate or set aside a judgment rendered by him, except upon motion for a new trial. *Winter v. Fitzpatrick*, 35 *Cal.* 269.

CHAPTER III.

PLACE OF TRIAL.

1. The remedy being selected and the jurisdiction of the various courts being fixed, the next inquiry is, in what county shall the proceedings be commenced; and since the commencement of the action is regulated by statute, no room is left to question as to where the venue of the action should be laid. The Practice Act provides, that actions must be commenced in a particular county or district, having reference: *First*, To the place where the subject matter in controversy is situated; or, *Second*, To the place where the cause of action arose; or *Third*, To the place where the parties to the action reside; according to the nature of the questions involved. Thus, real actions, or actions affecting real property, have a tendency to a fixed and local jurisdiction; while personal actions are transitory in their character.

ACTIONS TO BE TRIED WHERE THE SUBJECT MATTER IS SITUATED.

2. The actions which are to be tried where the subject matter or some part of it is situated, subject to a change of place of trial are as follows: *First*, For the recovery of real property, or an interest therein, etc., or for injuries to real property. *Second*, For the partition of real property; and, *Third*, For the foreclosure of a mortgage on real property. And if such real property be situated in two counties, then in either county which the plaintiff may select. *Cal. Pr. Act*, § 18; *N.Y. Code*,

§ 123; *Nash's Ohio Pl.* p. 16-17; *Wash. Terr.* § 37; *Idaho.* § 18; *Arizona* § 18.

3. By the laws of Oregon, § 41, and of Iowa, § 2,795, the recovery of personal property is included in this section, and is made a local action; while the laws of Arizona include mining claims, but make no provision for the contingency of the property or estate lying in contiguous counties. (*Code of Arizona*, § 18.) In California, also, mining claims are included under the provisions of this section; (*Watts v. White*, 13 *Cal.* 321;) and while it provides for the trial in certain counties, the *situation* of the premises, not the residence of the parties, determines the county. *Doll v. Feller*, 16 *Cal.* 433.

4. This section does not apply to actions for lands lying out of the State. (*Newton v. Bronson*, 3 *Kern.* 587; *Mussina v. Belden*, 6 *Abb. Pr.* 166.) But to actions for the possession of real property within the State. (*Mairs v. Ramsen*, 3 *Code R.* 138.) Or, for the determination of a right or interest therein. (*Wood v. Hollister*, 3 *Abb. Pr.* 14; *Starks v. Bates*, 12 *How. Pr.* 465.) Or, for the recovery of title thereto. (*Ring v. McCoun*, 3 *Sandf.* 524; *Wood v. Hollister*, 3 *Abb. Pr.* 14; *Newton v. Bronson*, 13 *N.Y.* 587.) Or, for the foreclosure of mortgages thereon. (*Vallejo v. Randall*, 5 *Cal.* 461; *Miller v. Hull*, 3 *How. Pr.* 325; *Marsh v. Lowry*, 26 *Barb.* 197; 16 *How. Pr.* 41; *Mairs v. Remsen*, 3 *Code R.* 138; *Wood v. Hollister*, 3 *Abb. Pr.* 14; but see *Raws v. Carr*, 17 *Abb. Pr.* 96; *Starks v. Bates*, 12 *How. Pr.* 465; *Ring v. McCoun*, 3 *Sandf.* 524.) As to the local jurisdiction of the same tribunal of a controversy affecting property within its limits, see *Nichols v. Romaine*, 9 *How. Pr.* 512.

5. Suits between counties shall be commenced in any county not a party to such action. (*Laws of Cal.* 1854, p. 194.) And suits against a county in any court of that county, or district court of the district in which such county is situated. *Id.*

ACTIONS WHICH ARE TO BE TRIED WHERE CAUSE OF ACTION AROSE.

6. The following actions shall be tried where the cause of action, or some part thereof arose, subject to a change of the venue: *First*, For the recovery of a forfeiture or penalty; except, etc., *Second*, against a public officer for an official act. *Cal. Pr. Act*, § 19; *N.Y. Code*, § 124; *Oregon*, § 42; *Wash. Terr.* 38; *Idaho*, § 19; *Arizona*, § 19.

7. In Ohio and Iowa in addition, "an action on the official bond of an officer. (*Nash's Ohio Pl.*, § 47; *Iowa Code*, § 2,796; also *Park v. Carnley*, 7 *How. Pr.* 355; *People v. Hayes*, 7 *How. Pr.* 248; *Brown v. Smith*, 24 *Barb.* 419; *Howland v. Willetts*, 5 *Sand.* 219; affirmed in 5 *Seld.* 170; *Porter v. Pillsbury*, 11 *How. Pr.* 240; *People v. Cook*, 6 *How. Pr.* 448; *Houck v. Lasher*, 17 *How. Pr.* 520.) But this section was held not to apply to officers of the United States. *Freeman v. Robinson*, 7 *Ind.* 321.

ACTIONS WHICH ARE TO BE TRIED WHERE PARTIES RESIDE.

8. In all other cases the action is to be tried where the defendants or some of them reside; or, *First*, If residing out of the State, or if about to depart from the State; *Second*, If the county in which they reside be

unknown—such action may be tried where either of the parties reside, or where service may be had subject to a change of venue. *Cal. Pr. Act*, § 20; *N.Y. Code*, § 125; *Oregon*, § 43; *Idaho*, § 20; *Arizona*, § 20.

9. The act of 1858 authorizes suit to be brought in any county, where the residence of defendant is unknown; but due diligence must be shown. (*Loehr v. Latham*, 15 *Cal.* 418.) And defendant has a right to have the action tried in the county of his residence, except in certain cases specified in the statute. *Loehr v. Latham*, 15 *Cal.* 418; approved as to change of venue in *Pierson v. McCahill*, 22 *Cal.* 131; *Jenkins v. Cal. Stage Co.*, 22 *Cal.* 538; *Prader v. Merchant*, *Cal. Sup. Ct. Apl. T.*, 1864.

10. **Corporation—Residence of.**—The principal place of business of a corporation is its residence. (*Jenkins v. Cal. Steam Nav. Co.*, 22 *Cal.* 537; *Hubbard v. Nat. Pro. Ins. Co.*, 11 *How. Pr.* 149; *Pond v. Hudson Riv. R. R. Co.*, 17 *How. Pr.* 543.) As to foreign corporations, see *International Co. v. Sweetland*, 14 *Abb. Pr.* 240.

11. **Divorce.**—A wife living apart from her husband, may bring action of divorce against him in the county in which she resides. 14 *Pick.* 185; 14 *Mass.* 231; 2 *Id.* 153, 167; 3 *Id.* 184; 2 *Cow. and H. notes*, 879; 9 *Greenl.* 147; *Vence v. Vence*, 15 *How. Pr.* 497; *Id.* 576.

12. **Habeas Corpus.**—The writ of *habeas corpus* should not issue, to run out of the county, unless for good cause shown. *Ex parte Ellis*, 11 *Cal.* 225.

13. **Injury to Person.**—Actions to recover damages for injuries to person should be brought under this section. (*McIvor v. McCabe*, 16 *Abb. Pr.* 319.) An action for creating a private nuisance, is an action for an injury to the person. *Ray v. Sellers*, 1 *Duvall (Ky.)*, 254.

14. **Mandamus.**—Proceedings for a *mandamus* to compel the execution of a sheriff's deed to a redemptioner, may be commenced in the county where the relator resides. *McMillan v. Richards*, 9 *Cal.* 420.

15. Quo Warranto.—In *quo warranto*, the people being a party, their residence extends to every county. *People v. Cook*, 6 *How. Pr.* 448.

16. Railroad Corporations.—As to the residence of railroad corporations, see *Vermont R. R. Co. v. Northern R. R. Co.*, 6 *How. Pr.* 106; *Sherwood v. Saratoga R. R. Co.*, 15 *Barb.* 650; *Belden v. N.Y. & Harl. R. R. Co.*, 15 *How. Pr.* 17; *People v. Pierce*, 31 *Barb.* 138; *Conroe v. Nat. Pro. Ins. Co.*, 10 *How. Pr.* 403; *Hubbard v. Nat. Pro. Ins. Co.*, 11 *How. Pr.* 149; see, however, *Pond v. Hudson Riv. R. R. Co.*, 17 *How. Pr.* 543.

17. Residence in Different Counties.—Where the parties reside in different counties, the suit shall be commenced in the county where the principal transaction occurred; or where it appears the largest number of witnesses reside. (*Jordan v. Garrison*, 6 *How. Pr.* 6.) "*Transaction*," when relating to a contract, includes the whole proceeding, beginning with the negotiation, and ending with the performance. *Robinson v. Flint*, 7 *Abb. Pr.* 393, *note*.

CHAPTER IV.

PARTIES.

1. A party to an action is one who is named plaintiff or defendant, and appears on the record as such. (*Woods v. De Figaniere*, 16 *Abb. Pr.* 1.) The party complaining shall be known as the plaintiff, and the adverse party as the defendant. (*Cal. Pr. Act*, § 2.) At common law, no person should be named in the record as a party, except such as may have judgment passed for or against him. (*Porter v. Mount*, 45 *Barb.* 422.) So a person named as defendant, but not served with a process, is not a party to the action. (*Robinson v. Frost*, 14 *Barb.* 536; *Steigers v. Gross*, 7 *Mo.* 261; *Norton v. Hayes*, 4 *Den.* 245; *East Riv. Bk. v. Cutting*, 1 *Bosw.* 636; but see *Dodge v. Averill*, 5 *How. Pr.* 8.)

2. A *guardian ad litem*, is not a party to the action. (*Brown v. Hull*, 16 *T. R.* 673; *Jarvis v. Boyd*, 5 *Porter (Ala.)*, 388; *Darrin v. Hatfield*, *N. Y. Ct. of App. Dec.* 1852, *Selden's Notes*; *Sinclair v. Sinclair*, 4 *New Pr. Cas.* 179; *Millink v. Collier*, 14 *Jurist*, 621.) A suit on the part of minors cannot be maintained by a person who is not a party in interest, but who describes himself as guardian of the parties who are interested, unless there is an averment that such parties are minors. The law presumes them to be adults. *Maxedon v. State*, 24 *Ind.* 370.

3. A stranger to a transaction has no right to sue. (*Chenery v. Palmer*, 5 *Cal.* 131; *McLaren v. Hutchin-*

son, 18 *Id.* 80; commented on and questioned in *Lewis v. Covillaud*, 21 *Cal.* 178.) The interest of a party must be actual to give a right of action. (*James v. Oakley*, 1 *Abb. Pr.* 324.) An application by a stranger to a suit to be allowed to intervene and be made a defendant, in order that he may litigate the plaintiff's claim, and set up a claim against the original defendants adverse to and exclusive of that of the plaintiff, is not a matter of strict right, but rests in the discretion of the court. *Mos.* 354; 6 *Mod.* 170; 4 *Hen. & Munf.* 483; *Scheidt v. Sturgis*, 10 *Bosw.* 606.

4. The same person cannot be plaintiff and defendant in the same suit at law, either solely or with others. (*Eastman v. Wright*, 6 *Pick.* 316; *Warren v. Stearns*, 19 *Pick.* 73; *Thayer v. Buffum*, 11 *Met.* 398; *Belknap v. Gibbens*, 13 *Met.* 471; *Sherwood v. Barton*, 23 *How. Pr.* 537; *Methodist E. Church v. Stewart*, 27 *Barb.* 553.) Therefore a man cannot sue himself. (*Cole v. Reynolds*, 18 *N.Y.* 76.) But a person may sue in two capacities, if they are not inconsistent. (*Ketchum v. Morrell*, 2 *N.Y. Leg. Obs.* 58.) Or a person may be sued in two capacities. See the case where a surviving partner, executor of deceased, as well as devisee, is made co-defendant with himself as executor. (*Savings and Loan Society v. Gibb*, 21 *Cal.* 595.)

5. Equity will make that party immediately liable, who is ultimately liable at law, and it thus avoids circuitry of action. *Riddle v. Mandeville*, 5 *Cranch*, 322; *Bank of the United States v. Weisiger*, 2 *Pet.* 331.

6. The general rule is, that all *persons* who have any material interest in the subject matter should be

joined as parties, either as complainants or defendants. (*Mechanics Bk. of Alexandria v. Seton*, 1 *Pet.* 299; *Vattier v. Hinde*, 7 *Id.* 252; *Story v. Livingston*, 13 *Id.* 259, 359; *Van Reimsdyk v. Kane*, 1 *Gall.* 371, 630; *West v. Randall*, 2 *Mas.* 181; *Soci. for Prop. of Gosp. v. Town of Hartland*, 2 *Paine* 536; *Joy v. Wirtz*, 1 *Wash. C. Ct.* 517; *Piatt v. Oliver*, 2 *McLean* 267; *Northern Indiana R. R. Co. v. Michigan Cent. R. R. Co.* 5 *Id.* 444; *Elmendorf v. Taylor*, 10 *Wheat.* 152; *United States v. Parrot*, 1 *McAll.* 271.) Or having a common interest. (*Wilson v. Castro*, 31 *Cal.* 420.) The word "person" in its legal signification is a generic term, and was intended to include artificial as well as natural. *Douglass v. Pacific M. S. S. Co.*, 4 *Cal.* 304.

7. There must be a plaintiff to every action, and the action cannot proceed after there ceases to be a plaintiff. (*Ryan v. Tomlinson*, 31 *Cal.* 11.) Nor can an action be maintained in a name as plaintiff which is neither that of a natural person, nor of such an artificial person as is recognized by the law as capable of suing. A proceeding commenced in such a name, there being no plaintiff, is not an action, but a mere nullity, and may be dismissed at any time. *Proprietors of Mexican Mill v. Yellow Jacket Co.*, 4 *Nev. Rep.* 40.

8. But an action may be brought by a party in the name by which he is known, though it be not his true name. (*Cooper v. Burr*, 45 *Barb.* 10.) A person may be made defendant under any name, if his real name be unknown; or he may be sued under a wrong name. (*People v. Byrnes*, 30 *Cal.* 206; *Crandall v. Beach*, 7 *How. Pr.* 271; *Pindar v. Black*, 4 *Id.* 95; *Allen v. Allen*, 11 *Id.* 277; *Bogardus v. Rosendale Manf. Co.* 3

Seld. 147; *Miller v. Stettiner*, 22 *How. Pr.* 518.) Where a defendant is known as well by one name as another, he may be sued and arrested by either, and it is immaterial by what name he was known to the plaintiffs in the action. *Engleston v. Son*, 5 *Rob.* 640.

REAL PARTY IN INTEREST.

9. Before the adoption of the code, actions on contract were brought in the name of the party in whom the legal interest was vested; (1 *Chitt. Pl.* 2; 1 *East.* 497; 8 *T. R.* 332; 1 *Saund.* 153; 7 *Mod.* 116; 2 *Burg.* 20; *Commercial Bank v. French*, 21 *Pick.* 489; *Warden v. Burnham*, 8 *Vt.* 390; *Franken v. Trimble*, 5 *Burr.* 520; *Caruthers v. Wardlaw*, *Dudley (Geo.)*, 189; *De Cordon v. Atchison*, 13 *Tex.* 372; *Taylor v. Steamboat "R. Campbell,"* 20 *Mo.* 254;) or whose legal interest had been affected. 1 *Chitt. Gen. Pr.* 6, 7; *Bridlen v. Perrot*, *Crompt. & M.* 602; *Foreman v. Jervis*, 5 *Barn. & Adol.* 386.

10. The legal interest was vested in him to whom the promise was made, and from whom consideration passed. (*Hall v. Huntoon*, 17 *Vt.* 244; *Lapham v. Green*, 9 *Vt.* 407; *Weathers v. Ray*, 4 *Dana* 474; *Clark v. McFarland*, 5 *Dana* 45.) Thus, in an action for breach of contract, where no other person has acquired an interest in the matter in dispute, only the parties to the contract sued on should be made parties to the action. *Barber v. Cazalis*, 30 *Cal.* 92.

11. The laws of California require that actions shall be prosecuted in the name of the real party in interest, and that all having an interest in the subject of the action be joined. (*Lyon v. Bertram*, 20 *How. U.S.* 150.)

The rule of the common law, that actions must be commenced in the name of the party in whom the legal interest is vested, has been changed by statute wherever a code has been adopted; (*Cal. Pr. Act*, § 4; *N.Y. Code* § 111; 1 *Van Santv. Pl.* 110; *Nash's Ohio Pl.* 8; *Swain's Ohio Pl.* 64; *Code of Iowa*, 2,757; *Oregon*, § 27; *Idaho*, § 4; *Arizona*, § 4;) and now actions must be brought in the name of the real party in interest, and the practice has been made to conform to the rule of equity with but slight modification. *Wiggins v. McDonald*, 18 *Cal.* 126; *Wedderspoon v. Rogers*, 32 *Cal.* 569; approved in *Poorman v. Mills*, 35 *Cal.* 118; see *Wallace v. Eaton*, 5 *How. Pr.* 99.

12. It is a question of great importance to know who the real party in interest is. The decisions of our own courts have been full upon this subject, as will appear by the references appended; and yet it may not be improper here to observe that "the real party in interest" is the party who would be benefited or injured by the judgment in the cause. In some cases, owing to legal or other disabilities, this rule will not apply; and yet the exceptions are rare.

13. The interest which warrants making a person a party, is not an interest on the question involved merely, but some interest in the subject matter of litigation. *Vallette v. Whitewater Valley Canal Co.*, 4 *McLean*, 192; 5 *West. Law Jour.* 80; see *Kerr v. Watts*, 6 *Wheat.* 550.) The rule should be restricted to parties whose interests are in issue, and are to be affected by the decree. *Mechanics Bk. of Alexandria v. Seton*, 1 *Pet.* 299; *Elmendorf v. Taylor*, 10 *Wheat.* 152; *Story v. Livingston*, 13 *Pet.* 359; *United States v. Parrot*, 1 *McAll.* 271.

14. Active parties are such as are so involved in the subject of the controversy, that no decree can be made without their being in court; and passive parties are such that complete relief can be given to those who seek it, without affecting their interests. *Joy v. Wirz*, 1 *Wash. C. Ct.* 517.

15. No one need be made a party against whom, if he were brought in, the plaintiff could have no decree. (*Van Reimsdyk v. Kane*, 1 *Gall.* 371.) But where a person not a party is a necessary party to a complete determination of the controversy, the Court must cause him to be brought in, whether defendant has objected or not, and this may be ordered in an appeal from a judgment. 4 *Paige*, 75; 7 *Barb.* 221; 1 *Pct.* 138, 139; 2 *Duer.* 663; 3 *Id.* 121; *Shaver v. Brainard*, 29 *Barb.* 25.

16. As between assignor and assignee, if the transfer is complete so that the assignor is divested of all control or right to the cause of action, and the assignee is entitled to control it and receive its fruits, the assignee is the real party in interest, whether the assignment was with or without consideration, and notwithstanding the assignee might have taken it subject to all equities, as between assignor and third parties. (*Cummings v. Morris*, 25 *N.Y.* 625; affirming S. C., 3 *Bosw.* 560.) Thus the assignee of the party beneficially interested may maintain the action. (*Wheatley v. Strobe*, 12 *Cal.* 98; *McLaren v. Hutchinson*, 22 *Id.* 187.) And if the whole interest has been assigned, he may sue in his own name. (*Hastings v. McKinley*, 1 *E. D. Smith*, 273; *Sharp v. Edgar*, 3 *Sand.* 379.) So where a promise is made to one party for the benefit of another, the latter, though

a stranger to the contract, may recover in a suit directly against the promisor and founded on the promise. *Scott v. Pilkington* 15 *Abb. Pr.* 280.

ASSIGNEE MAY SUE.

17. To enable the assignee of a thing in action to sue in his own name, the assignment must be antecedent to the action. (*Clark v. Downing*, 1 *E. D. Smith*, 406; *Beach v. Raymond*, 2 *E. D. Smith*, 496; *Mills v. Fox*, 4 *E. D. Smith*, 220; *St. Johns v. Amer. Mut. Li. Ins. Co.*, 3 *Kern.* 31; *Vogel v. Badcock*, 1 *Abb. Pr.* 176; *Richardson v. Mead*, 27 *Barb.* 178; *Arthur v. Brooks*, 14 *Barb.* 533; *Eastern Plank R. R. Co. v. Vaughan*, 4 *Ker.* 546.) Any interest in property is assignable. *Emmons v. Cairn*, 3 *Barb.* 243.

ASSIGNMENT SUBJECT TO EQUITIES.

18. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set off or other defense existing at the time of, or before, notice of the assignment; but this section shall not apply to a negotiable promissory note, or bill of exchange, transferred in good faith and upon good consideration before due. (*Cal. Pr. Act*, § 5; *N.Y. Code*, § 112; *Nash's Ohio*, § 26; *Laws of Iowa*, § 2,760; *Oregon*, § 28; *Idaho*, § 5; *Arizona*, § 5.) Latent equities of third persons are not contemplated in this section. (*Murray v. Lylburn*, 2 *Johns. Ch.* 441; *Livingston v. Dean*, *Id.* 479; *Rodriguez v. Heffernan*, 5 *Id.* 417; *Murray v. Ballou*, 1 *Id.* 566.) As to after accruing equities, see *Coster v. Griswold*, 4 *Edw.* 364.

WHAT MAY BE ASSIGNED.

19. Equity upholds assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no actual existence, but rest in possibility; provided they are fairly made, and are not against public policy. *Pierce v. Robinson*, 13 *Cal.* 123; approved in *People v. Huth*, 14 *Cal.* 407; *Bibend v. L. and L. Fire and Li. Ins. Co.*, 30 *Id.* 86.

20. Thus, contingent interests and expectant estates may be assigned. (*Nicoll v. N.Y. and Erie R.R. Co.*, 12 *N.Y.* 121; *Lawrence v. Bayard*, 7 *Paige*, 70; *Field v. Mayor of N.Y.*, 6 *N.Y.* (2 *Seld.*) 179.) And when the chose in action rests in expectancy, assignment takes effect when it is subsequently brought into existence. *Field v. Mayor, etc.*, 2 *Seld.* 179; *Lawrence v. Bayard*, 7 *Paige*, 70.

21. A bid at a judicial sale may be assigned. (*Proctor v. Farnam*, 5 *Paige*, 614.) Or a bond for title in Indiana is assignable. (*Westcott v. Cole*, 4 *McLean*, 79.) So, a vested interest in remainder in personal property, although liable to be defeated by a future event, may be assigned. (*Munsell v. Lewis*, 4 *Hill N.Y.* 635.) Or a legacy, if clothed with a trust, may be assigned. *Andrew v. N.Y. Bible Society*, 4 *Sand.* 156.

22. But the right of an heir apparent is a mere possibility, and not the subject of a grant; (*Stover v. Eyclesheimer*, 46 *Barb.* 84;) though a mere possibility, coupled with an interest, may be assigned. (*Comegys v. Vasse*, 1 *Pet.* 193, 213; *Lawrence v. Bayard*, 7

Paige, 76; *Hinckle v. Wanzer*, 17 *How. U. S.* 368; *Field v. Mayor of N.Y.*, 2 *Seld.* 179.) How far equity will support assignments of contingent interests and expectations, consult *Stover v. Eyclesheimer*, 3 *Keyes*, 620; affirming *S. C.*, 46 *Barb.* 84.

23. A parol assignment of a chose in action is valid in equity. (*Hooker v. Eagle Bk.*, of Rochester, 30 *N. Y.* 83; *Armstrong v. Cushney*, 43 *Barb.* 340.) If conditional and without consideration, it is invalid. (*Arnold v. Johnson*, 28 *How. Pr.* 249.) As no formality is necessary to affect an assignment of a chose in action (*Ford v. Stewart*, 19 *Johns.* 95), any transaction which indicates intention to pass the beneficial interest is sufficient. 2 *Sto. Eq.* 311.

CAUSES OF ACTION ASSIGNED.

24. A cause of action for breach of contract may be assigned. (*Monahan v. Story*, 2 *E. D. Smith*, 393; *Munson v. Riley*, *Id.* 130.) So a cause of action against common carrier, for not delivering personal property. (*McKee v. Judd*, 2 *Kern.* 622; *Smith v. N.Y. and N.H. R.R. Co.*, 28 *Barb.* 605; 16 *How. Pr.* 277; *Merrick v. Brainard*, 38 *Barb.* 574; *Follman v. Newton*, 3 *E. D. Smith*, 463; affirmed, 2 *Kern.* 400; *People v. Tioga Com. Pleas.*, 19 *Wend.* 73; *Hoyt v. Thompson*, 1 *Seld.* 320; *Waldron v. Willard*, 17 *N. Y.* 466; *Foy v. The Troy and Bost. R.R. Co.*, 24 *Barb.* 382.) Or for loss of baggage; (*Merrill v. Grinnell*, 30 *N. Y.* 594;) or for injury to goods while in his charge. *Merrick v. Van Santvoord*, 34 *N. Y.* 208.

25. Any contract upon which an action may be maintained, is assignable. (*Cal. St'm Nav. Co. v. Wright*, 6

Cal. 258; *Taylor v. Palmer*, 31 *Id.* 240; affirmed in 33 *Id.* 296; *Doll v. Anderson*, 27 *Id.* 248; *Field v. Mayor of N.Y.*, 2 *Seld.* 179; *Parsons v. Woodward*, 2 *N. Y. Rep.* 196; *Prinde v. Caruthers*, 15 *N. Y.* 425; *Sears v. Conover*, 34 *Barb.* 330.) And the assignee in contract is the proper party to the action. (*Warner v. Wilson*, 4 *Cal.* 310; *Owen v. Frink*, 24 *Cal.* 177; *Taylor v. Palmer*, 31 *Cal.* 240; *Clark v. Downing*, 1 *E. D. Smith*, 406; *Beach v. Raymond*, 2 *E. D. Smith*, 496; *Mills v. Fox*, 4 *E. D. Smith*, 220; *Vogel v. Badcock*, 1 *Abb. Pr.* 176; *Burnett v. Gwynne*, 2 *Abb. Pr.* 79; *Richardson v. Mead*, 27 *Barb.* 178; *Arthur v. Brooks*, 14 *Barb.* 533; *East. Pl. Road Co. v. Vaughan*, 4 *Ker.* 546.) An action on an express contract must in general be brought against the party who made it, either in person or by agent. 1 *Chitt.* 33; 8 *East.* 12; 3 *Esp. R.* 26; 3 *Camp.* 354.

26. A defendant is not entitled to compel one who takes an assignment of the cause of action pending the suit, to become a plaintiff without his consent. (*Packard v. Wood*, 17 *Abb. Pr.* 318; disapproving *Shearman v. Coman*, 22 *How. Pr.* 517.) And an offer of defendant to show that plaintiff has assigned his interest is properly excluded. *Boyce v. Brockway*, 31 *N. Y.* 490.

27. Thus the assignee of a covenantee may bring action for breach of covenant. (*Beach v. Barons*, 13 *Barb.* 305.) Or the assignee of an agreement for specific performance, who takes it subject to all the equities. *Murray v. Gouverneur*, 2 *Johns. Cas.* 438.

28. A cause of action for conversion of property may be assigned. (*Robinson v. Weeks*, 6 *How. Pr.*

161; *McKee v. Judd*, 12 *N.Y.* 622; *Genet v. Howland*, 30 *How. Pr.* 360; *Ward v. Benson*, 31 *How. Pr.* 411; compare *Howell v. Kroose*, 2 *Abb. Pr.* 167.) A factor may maintain such action. (*Gorum v. Carey*, 1 *Abb. Pr.* 285.) Or a forwarding merchant. (*Fitzhugh v. Wiman*, 5 *Seld.* 559.) After conversion, owner may sell the chattels, or assign his right of action for conversion. *Hall v. Robinson*, 2 *Cow.* 293; *Cass v. N. H. R. R. Co.*, 1 *E. D. Smith*, 522; *Robinson v. Weeks*, 1 *Code R. (N.S.)* 311; *McGinn v. Worden*, 3 *E. D. Smith*, 355; *Wilson v. Cook*, *Id.* 252; *Howell v. Croose*, 4 *Id.* 357; *North v. Turner*, 9 *Serg. & R.* 244; *Hoyt v. Thompson*, 1 *Seld.* 847; *McKee v. Judd*, 2 *Kern.* 622; *Hicks v. Cleveland*, 39 *Barb.* 573; *Waldron v. Willard*, 17 *N.Y.* 467.

29. Assignment of property gives the right to sue in trover for its conversion before assignment. (*Ward v. Benson*, 31 *How. Pr.* 411; *Genet v. Howland*, 45 *Barb.* 560; 30 *How. Pr.* 360; *Sherman v. Elder*, 24 *N.Y.* 381; *Boyce v. Brockway*, 31 *N.Y.* 490.) *Present possession* is sufficient to ground an action for conversion by a stranger. *Paddock v. Wing*, 16 *How. Pr.* 547.

30. In New York a cause of action for causing the death of another may be assigned. (*Quinn v. Moore*, 51 *N.Y.* 432; *Doedt v. Wiswall*, 15 *How. Pr.* 128; *Hodgman v. Western R.R. Corporation*, 7 *How. Pr.* 492; *Purple v. Hudson Riv. R.R. Co.*, 1 *Abb. Pr.* 33; 4 *Duer*, 73.) Or, for slander. (*Nash v. Hamilton*, 3 *Abb. Pr.* 35.) Principle generally stated, in *McKee v. Judd*, 2 *Kern.* 622; *Butler v. N.Y. and Erie R.R. Co.*, 22 *Barb.* 110; *Robinson v. Wells*, 6 *How. Pr.* 161.

31. A cause of action for damages to property may be assigned. (*Fried v. N.Y. Cent. R.R. Co.*, 25 *How. Pr.* 285.) So for damages to personal property. (*Butter v. N.Y. and Erie R.R. Co.*, 22 *Barb.* 110; *Foy v. Troy and Bost. R.R. Co.*, 24 *Barb.* 382; *Haight v. Hoyt*, 19 *N.Y.* 464.) Or to real property, as for negligently setting fire to grass and fences. (*Field v. N.Y. Cent. R.R. Co.*, 25 *How. Pr.* 285.) A right of action for wrongfully and without permission raising ores and minerals from land situate in another state, belonging to another person, and selling and converting them, is assignable, and may be prosecuted in the courts of this state by one to whom the owner has assigned such ores and minerals, and all claim for their wrongful conversion. *Hoy v. Smith*, 49 *Barb.*

32. A cause of action for fraudulent misapplication of funds of a corporation may be assigned. (*Grocers' Nat. Bk. v. Clarke*, 32 *How. Pr.* 160; *Gould v. Gould*, 36 *Barb.* 270. Or for money obtained by fraud. (*Byxbie v. Wood*, 24 *N.Y.* 607; *Ohio Code*, § 398.) Or for false representations. (*Zabriskie v. Smith*, 3 *Kern.* 322; *Hyslop v. Randall*, 11 *How. Pr.* 94; 4 *Duer*, 660.) Or for deceit. (*Hyslop v. Randall*, 4 *Duer*, 660; *Sheldon v. Wood*, 2 *Bosw.* 267.) Or a cause of action for damages, for procuring a sale of goods by false representations, is assignable; and the assignees may sue thereon without joining the assignor. *Johnston v. Bennett*, 5 *Abb. Pr. (N.S.)* 331; *Allen v. Brown*, 51 *Barb.* 86.

CHUSES IN ACTION ASSIGNED.

33. Choses in action may be assigned. (*Walling v.*

Miller, 15 *Cal.* 38; *Watson v. Hunkins*, 13 *Iowa*, 547; *Dobyns v. McGovern*, 15 *Mo.* 662; *Zabriskie v. Smith*, 3 *Kern.* 322; *Butler v. New York and Erie R. R. Co.*, 22 *Barb.* 110; *Hodgman v. Western R.R. Co.*, 7 *How. Pr.* 493; *Merchants' Ins. Co. of Buffalo v. Eaton*, 11 *N.Y. Leg. Obs.* 140.

34. The assignee of a chose in action is in all cases the proper party to sue. (*Combs v. Bateman*, 10 *Barb.* 573; *Swan's Ohio Pl.* 65; *Pate v. Gray*, *Hempst.* 155.) But if the assignment is not absolute, or if any interest remains in the assignor, as where a mortgage is assigned as security, or where part of a debt or chose in action is assigned, the assignor if not united as plaintiff is a necessary party defendant. *Christie v. Herrick*, 1 *Barb. Ch.* 154; *Story's Eq. Pl.* 153.

35. The assignor and assignee of real estate are properly joined in an action to cancel a judgment rendered prior to assignment. (*Monroe v. Delavan*, 26 *Barb.* 16.) Or in suit upon a bond. (*Western Bank v. Sherwood*, 29 *Barb.* 387.) So the assignor of a draft for money may be joined in a suit against the drawer. *Thompson v. Payne*, 21 *Tex.* 621.

36. But on an assignment absolute on its face, the assignor need not be made a party. (*Gradwohl v. Harris*, 29 *Cal.* 150; *Trecothick v. Austin*, 4 *Mas.* 16; *Sheldon v. Wood*, 2 *Bosw.* 267; *Durgin v. Ireland*, 14 *N.Y.* 222.) In what cases an assignee of a right in action may prosecute it under the laws of Minnesota, see (*St. Anthony Co. v. Vandall*, 1 *Minn.* 246.) In that State, an assignee of an instrument in writing, not negotiable, cannot maintain the action in his own name. *Spencer v. Woodbury*, 1 *Minn.* 105.

37. The assignee of a chose in action takes it subject to all equities existing at the time of the assignment. (*Duff v. Hobbs*, 19 *Cal.* 646; *James v. Morey*, 2 *Cow.* 246; *Niagara Bank v. Roosevelt*, 9 *Cow.* 409; *Evans v. Ellis*, 5 *Den.* 640; *Mechanics Bank v. N.Y. and N.H. R.R. Co.*, 3 *Kern.* 599; *McCready v. Rumsey*, 21 *How. Pr.* 271; *Furman v. Haskin*, 2 *Cai.* 368; *Livingston v. Dean*, 2 *Johns. Ch.* 479; *Bank of Niagara v. McCracken*, 18 *Johns.* 492; *Chamberlain v. Gorham*, 20 *Johns.* 144; *Chamberlain v. Day*, 3 *Cow.* 353; *Graves v. Woodbury*, 4 *Hill*, 559; *Webster v. Wise*, *Id.* 319; *Heath v. Hand*, *Id.* 329; *Pendleton v. Fay*, 2 *Paige*, 202; *Evertson v. Evertson*, 5 *Id.* 644; *Gay v. Gay*, 10 *Id.* 369; *McChain v. Duffy*, 2 *Duer.* 645; *Western Bank v. Sherwood*, 29 *Barb.* 383; *Beckwith v. Union Bank*, 4 *Sand.* 610; affirmed in 5 *Sld.* 211; *Bush v. Lathrop*, 22 *N.Y.* 535; *Wood v. Perry*, 1 *Barb.* 115; *Ainsley v. Boynton*, 2 *Barb.* 258; *Mangles v. Dixon*, 3 *Ho. of L. Cas.* 702; *Roberts v. Carter*, 24 *How. Pr.* 44; *Butler v. N.Y. and Erie R.R. Co.* 22 *Barb.* 110; *United States v. Sturges*, 1 *Paine*, 525; *Shaw v. Shaw*, 4 *Cranch, C. Ct.* 715; *Thomas v. Page*, 3 *McLean*, 369; *Lewis v. Baird*, *Id.* 56; *Shirras v. Caig*, 7 *Cranch*, 34, 48; *Ely v. McKnight*, 30 *How. Pr.* 97; *Bullard v. Raynor*, 30 *N.Y.* 197; *Russell v. Clark*, *Id.* 69, 97; *Kinsman v. Parkhurst*, 18 *How. Pr.* 289; affirming *S.C.*, 1 *Blatch. C. Ct.* 488; *Fales v. Mayberry*, 2 *Gall.* 560; *Tatham v. Loring*, 5 *N.Y. Leg. Obs.* 208.)

CLAIMS MAY BE ASSIGNED.

38. A claim for the conversion of funds intrusted to one as agent may be assigned. (*Gould v. Gould*, 36 *Barb.* 270.) Or a claim against a public officer, for fees,

may be assigned. (*Platt v. Stout*, 14 *Abb. Pr.* 178,) Or a claim for sheriff's fees. *Birkbeck v. Stafford*, 23 *How. Pr.* 236 ; 14 *Abb. Pr.* 285.

39. The claim of a foreign executor may be assigned, (*Peterson v. Chemical Bk.*, 32 *N.Y.* 21; *Middlebrook v. Merchants Bk.*, 27 *How. Pr.* 474.) Or a claim against a foreign government. (*Comegys v. Vasse*, 1 *Pet.* 193 ; *Milnor v. Metz*, 16 *Id.* 221 ; *United States v. Hunter*, 5 *Mass.* 62; *McBlair v. Gibbes*, 17 *How. U.S.* 232 ; *Couch v. Delaplaine*, 2 *N.Y.* 397. Or a claim under a policy of insurance may be assigned, whether of a foreign or domestic insurance. *Carroll v. Charter Oak Ins. Co.*, 38 *Barb.* 402.

40. A claim to recover back money may be assigned. (*Palen v. Johnson*, 46 *Barb.* 21.) Or for money lent. (*Westcott v. Keeler*, 4 *Bosw.* 564.) Or against inn-keeper for money stolen at inn. (*Stanton v. Leland*, 4 *E. D. Smith*, 88.) A claim of stockholders against a company may be assigned. (*Peckham v. Smith*, 9 *How. Pr.* 436.) So also, a claim to allow a tenant certain privileges may be assigned. *Munson v. Riley*, 2 *E. D. Smith*, 130.

41. The assignee of a claim for damages for trespass on land may sue. (*Moore v. Massini*, 32 *Cal.* 590.) And, in general, claims for torts which would survive to the personal representatives of a party may be assigned. (6 *How. Pr.* 161; 7 *Id.* 493; 1 *Seld.* 347; 2 *Comst.* 294; *N.Y. Code*, 84; *Grant v. Ludlow*, 8 *Ohio St. R.* 1.) As to the general non-assignable character of claims for unliquidated damages arising out of torts, see 2 *Story Eq.* § 1,040; *Thurman v. Wells*, 18 *Barb.* 500; *Gardner*

v. Adams, 12 *Wend.* 297; *Hall v. Robinson*, 2 *Comst.* 293; Brig "Sarah Ann," 2 *Sumn.* 211; *Zabriskie v. Smith*, 3 *Kern.* 322; *Whittle v. Skinner*, 23 *Ot.* 531; *People v. Tioga, C. P.*, 19 *Wend.* 77.

CREDITORS.

42. A claim due to assignees, as trustees for the benefit of creditors, cannot be assigned. (*Small v. Ludlow*, 1 *Hilt.* 189.) Though such assignee may sue. (*Russell v. Clark*, 7 *Cranch.* 69, 97; *Fitch v. Warring*, 6 *N.Y. Leg. Obs.* 160.) As to necessity of delivery under assignment to creditors for their own benefit. (*Van Buskirk v. Warren*, 2 *Keyes*, 119.) Either member of a partnership may secure one of its creditors by a transfer of property; and this may be done by an assignment in the nature of a mortgage, with a trust to account for and repay the surplus, if any. *McClelland v. Remsen*, 5 *Abb. Pr. (N.S.)* 250.

44. Assignment by a creditor does not make assignee joint owner of the whole debt, and he is not a necessary party in a suit for its recovery. (*Leese v. Sherwood*, 21 *Cal.* 152.) The assignee for the benefit of creditors may maintain an action for the conversion of a promissory note. (*Whittaker v. Merrill*, 30 *Barb.* 389; *Westcott v. Keeler*, 4 *Bosw.* 564.) And, generally, an action may be brought in the name of the trustee, so long as the assignment remains in force. *Ogden v. Prentice*, 33 *Barb.* 160; *Lewis v. Graham*, 4 *Abb. Pr.* 106.

45. The assignee for the benefit of creditors takes subject to all the equities existing at the time of the assignment. *Curtiss v. Leavitt*, 15 *N.Y.* 195; *Griffin*

v. Marquardt, 17 *Id.* 580; *Van Heusen v. Radcliffe*, *Id.* 584; *Myers v. Davis*, 22 *N.Y.* 489; *Marine and Fi. Ins. Bk. of Georgia v. Jauncey*, 1 *Barb.* 486; *Leger v. Bonnafie*, 2 *Barb.* 475; *Warren v. Fenn*; 28 *Barb.* 333; *Reed v. Sands*, 37 *Barb.* 185; *Maas v. Goodman*, 2 *Hilt.* 280; *Hicks v. McGroarty*, 2 *Duer*, 295; *Mead v. Phillips*, 1 *Sand. Ch.* 83; *Matter of Howe*, 1 *Paige*, 125.

DEBTS MAY BE ASSIGNED.

46. Debts may be assigned. (*McEwen v. Johnson*, 7 *Cal.* 260 ; *Wheatley v. Strobe*, 12 *Id.* 97 ; *Pope v. Huth*, 14 *Id.* 408.) And the assignee may sue in his own name. (*Porter v. Foley*, 21 *How. Pr.* 394.) And debts may be assigned in parcels. (*Marziou v. Pioche*, 8 *Cal.* 536 ; *McEwen v. Johnson*, 7 *Cal.* 260 ; *Field v. Mayor of N.Y.*, 2 *Seld.* 179 ; *Poor v. Guilford*, 10 *N.Y.* 273 ; *Bowdoin v. Coleman*, 3 *Abb. Pr.* 431 ; *Cook v. Genessee Mut. Ins. Co.*, 8 *How. Pr.* 514 ; *Ingraham v. Hall*, 11 *S. and R.* 78 ; *Moore v. Trumpbour*, 5 *Cow.* 488 ; *Lore v. Fairchild*, 13 *Mo.* 300 ; *Palmer v. Merrill*, 6 *Cush.* 282 ; *Richardson v. Ainsworth*, 20 *How. U.S.* 521.) So, an agreement to pay money to defendant, on condition of withdrawing a defense to a suit, is assignable. (*Gray v. Garrison*, 9 *Cal.* 325.) One of several parties may assign a debt due to the firm. *Everit v. Strong*, 5 *Hill*, 163 ; 7 *Id.* 585 ; *Punckney v. Wallace*, 1 *Abb. Pr.* 82.

47. Future debts may likewise be assigned. (*Power v. Alger*, 13 *Abb. Pr.* 475.) So, a demand for street assessment may be assigned. (*Cochran v. Collins*, 29 *Cal.* 129 ; *Taylor v. Palmer*, 31 *Id.* 240.) Or extra compensation thereon. (*Munsell v. Lewis*, 4 *Hill*, 635;

Munsell *v.* Lewis, 2 *Den.* 224.) But an assignment of a debt not in existence creates an equity only. Hassie *v.* G. I. W. U. Cong., 35 *Cal.* 378.

48. The assignment of a debt carries with it all the collateral securities held by the assignor. (Hurt *v.* Wilson, *Cal. Sup. Ct. Jul. T.* 1869; Jackson *v.* Blodgett, 5 *Cow.* 202; Parmelee *v.* Dann, 23 *Barb.* 469; Pattison *v.* Hull, 9 *Cow.* 747; Paine *v.* French, 4 *Ohio R.* 318.) In an assignment of a debt upon a written instrument, delivery of the instrument is in general sufficient. (Horner *v.* Wood, 15 *Barb.* 371; Ford *v.* Stewart, 19 *Johns.* 342; 16 *Id.* 51; 11 *Id.* 534; 6 *Wend.* 80.) It is not necessary to prove a consideration. (Clark *v.* Downing, 1 *E. D. Smith*, 406; 2 *Id.* 497; 4 *Id.* 220; Richardson *v.* Mead, 27 *Barb.* 178.) Nor to state whether assignment was in writing or by parol. Vogel *v.* Babcock, 10 *How. Pr.* 177; Horner *v.* Wood, 15 *Barb.* 371.

49. The assignee of an account may sue on it in his own name. (Carpenter *v.* Johnson, 1 *Nev.* 332.) Accounts may be assigned by parol, and a substituted party may be assignee. (Waldron *v.* Baker, 4 *E. D. Smith*, 440.) The balance due on an unliquidated account may be assigned, and the assignee may sue thereon. (Allen *v.* Smith, 16 *N.Y.* 415; Westcott *v.* Potter, 40 *Vt.* 27.) But it is held that book accounts are not assignable at law, though they may be in equity. Anderson *v.* Tompkins, 1 *Brock. Marsh.* 48.

50. A policy of insurance on life may be assigned. (St. John *v.* Am. Mut. Li. Ins. Co., 13 *N.Y.* 31, Miller *v.* Hamilton Ins. Co., 17 *N.Y.* 609; Fowler *v.* N.Y.

Indem. Ins. Co., 23 *Barb.* 151; *Valton v. Nat. Loan Fund Li. Ins. Co.*, 20 *N.Y.* 32.) So of fire insurance policies. (*Brichta v. N.Y. Lafayette Ins. Co.*, 2 *Hall*, 372; *Goit v. Nat. Pro. Ins. Co.*, 25 *Barb.* 189; *Mellen v. Hamilton*, 5 *Duer.* 101; *Courtney v. N. Y. City Ins. Co.*, 28 *Barb.* 116.) The assignor of a policy of insurance takes it subject to all the equities existing at the time of assignment. *Waters v. Allen*, 5 *Hill*, 421; *Buffalo St'm Eng. Works v. Sun Mut. Ins. Co.*, 17 *N.Y.* 401.

51. The assignor of a policy of insurance, retaining an interest, may join with assignee in the action. (*Boynton v. Chilton & Essex Mut. Ins. Co.*, 16 *Barb.* 254.) Though the assignee may sue in his own name. *Fowler v. N. Y. Indem. Ins. Co.*, 23 *Barb.* 143.

52. Promissory notes, bills and checks may be assigned, and mere delivery without indorsement or assignment is sufficient transfer to give transferee the right to sue, if indorsed in blank or payable to bearer. (*Loftus v. Clark*, 1 *Hill.* 310.) Possession alone is sufficient to give the right to sue. *McCann v. Lewis*, 9 *Cal.* 246; cited in *Corcoran v. Doll*, 32 *Cal.* 88; *Price v. Dunlap*, 5 *Cal.* 483; *Gushee v. Leavitt*, *Id.* 160; *James v. Chalmers*, 5 *Sand.* 52; affirmed, 2 *Seld.* 209; *Cummings v. Morris*, 3 *Bosw.* 560.

53. The assignee of a note is the proper party to bring suit. (*Combs v. Bateman*, 10 *Barb.* 573; *Billings v. Jane*, 11 *Barb.* 620; *White v. Low*, 7 *Barb.* 204.) In Arkansas, to authorize the assignee to sue in his own name upon a note, it must not only be assigned and made over, but must be indorsed. *Brady v. Trammel*, *Hempst.* 164.

54. A negotiable chose in action, though fraudulent between the parties to it, cannot be impeached in the hands of an innocent holder. (*Wright v. Levy*, 12 *Cal.* 257; approved in *Northam v. Gordon*, 23 *Cal.* 255; and *Hobbs v. Duff*, *Id.* 626; *Gregory v. Haworth*, 25 *Cal.* 655.) That fraudulent assignor cannot sue, affirmed in (*Davis v. Mitchell*, 34 *Cal.* 90.) The *bona fide* indorsee of a negotiable instrument who has received it in part payment of an antecedent debt, takes it discharged of antecedent equities of which he had not notice. *Swift v. Tyson*, 16 *Peters*, 1; approved in *Cecil Bk. v. Heald*, 25 *Md.* 562; *May v. Quimby*, 3 *Bush*, 96.

55. But negotiable paper, after losing its negotiable character, is subject to all the equities. (*Folsom v. Bartlett*, 2 *Cal.* 164; approved in *Hill v. Griggsby*, 35 *Cal.* 956; *Warner v. Wilson*, 4 *Id.* 309; *Gwathmey v. McLane*, 3 *McLean*, 371; *Dundas v. Bowler*, *Id.* 397; *Slacom v. Wishart*, *Id.* 517; *Rounsavel v. Scholfield*, 2 *Cranch, C. Ct.* 139.) So with negotiable promissory note, when transferred as collateral security. *Payne v. Bensley*, 8 *Cal.* 260; affirmed in *Robinson v. Smith*, 14 *Id.* 94; and *Naglee v. Lyman*, *Id.* 450; see, also, *Coghlin v. May*, 17 *Cal.* 517.

56. The indorsee of a certificate of deposit holds it subject to all the equities between the indorser and indorsee. (*Coye v. Palmer*, 16 *Cal.* 158; approved in *Mills v. Barney*, 22 *Cal.* 249; cited in *Poorman v. Mills*, 35 *Cal.* 118.) A party taking a check after its presentation for payment, and its dishonor, takes it subject to all defenses to which it was subject in the hands of the original holder. (*Fuller v. Hutchings*, 10 *Cal.* 523.) And an indorsee in an action against indorser can

recover only the consideration he has actually paid. *Coye v. Palmer*, 16 *Cal.* 158 ; approved in *Mills v. Barney*, 22 *Id.* 249.

57. Rents may be assigned, and the assignee of lessor may maintain an action for rent. (*Main v. Feathers*, 21 *Barb.* 646 ; *Main v. Davis*, 32 *Barb.* 461 ; or in ejectment, *Main v. Green*, 32 *Barb.* 448, 33 *Barb.* 136.) The assignee of a fee farm rent may maintain an action therefor in his own name. (*Scott v. Lunt*, 7 *Pet.* 596.) Or the assignee of rent under a perpetual lease may sue on the covenant to pay. (*Van Rensselaer v. Reed*, 26 *N.Y.* 558.) Or in ejectment for non payment. (*Van Rensselaer v. Slingerland*, 26 *N.Y.* 580.) Surplus rents and profits, after satisfaction of a mortgage, may be recovered by an assignee. *Gordon v. Lewis*, 2 *Sumn.* 143.

58. A mere delivery, with intent to transfer, is sufficient to entitle transferee to sue for seamen's wages. (*Loftus v. Clark*, 1 *Hilt.* 310.) Or for money due upon a subscription list. (*Van Rensselaer v. Aikin*, 44 *Barb.* 547.) Or for subscription money to a corporation. *Peckham v. Smith*, 9 *How. Pr.* 436.

JUDGMENTS MAY BE ASSIGNED.

59. Judgments are debts, and may be assigned. (*Wright v. Levy*, 12 *Cal.* 247 ; *Fore v. Manlove*, 18 *Cal.* 436 ; approved, 23 *Cal.* 255 ; see *Borst v. Baldwin*, 30 *Barb.* 180 ; *Harbeck v. Vanderbilt*, 20 *N.Y.* 395.) And a decree, though not assignable at law, is transferable for valuable consideration. (*Coate v. Muse*, 1 *Brock. C. Ct.* 551 ; *Dunlop v. Stetson*, 4 *Mas. S.C.* 349.)

The assignment of a judgment void from excess of jurisdiction carries with it the assignment of the debt on which it was obtained. (*Brown v. Scott*, 25 *Cal.* 194.) As to assignment of judgment recovered in a cause of action sounding in tort, see *King v. Kirby*, 28 *Barb.* 49.

60. A verdict for personal tort is assignable. (*Mackey v. Mackey*, 43 *Barb.* 58; which, it seems, overrules *Brooks v. Hanford*, 15 *Abb. Pr.* 342.) The assignee of a judgment in replevin may sue upon the undertakings given therein. (*Bowdoin v. Coleman*, 6 *Duer*, 182; 3 *Abb. Pr.* 431.) Or the replevin bond may be assigned. (*Wingate v. Brooks*, 3 *Cal.* 112; *Acker v. Finn*, 5 *Hill*, 293.) But to enable the assignee of a judgment to sue on the appeal bond, he must have an assignment of the bond. *Moses v. Thorne*, 6 *Cal.* 87.

61. The assignee of a judgment stands in the shoes of the assignor, as to all defenses which existed against the judgment. (*Brown v. Ayres*, 33 *Cal.* 525; *Wright v. Levy*, 12 *Cal.* 257; approved, 23 *Cal.* 25; and *Id.* 626; *Reynolds v. Harris*, 14 *Id.* 681; approved, 18 *Cal.* 289; *Porter v. Liscom*, 22 *Id.* 430; *Northam v. Gordon*, 23 *Id.* 255; *Hobbs v. Duff*, *Id.* 596; *Livingston v. Hubbs*, 2 *Johns. Ch.* 512; *Westfall v. Jones*, 23 *Barb.* 9; *Borst v. Baldwin*, 17 *How. Pr.* 285; *United States v. Sampergac*, *Hempst.* 118, 142, 149; 7 *Peters*, 222; *Poor v. Guilford*, 10 *N.Y.* 273; *Douglass v. White*, 3 *Barb. Ch.* 621.) The purchaser of a judgment takes the same, subject to all the equities and rights of set off existing between the parties at the time of the purchase. *Wright v. Levy*, 12 *Cal.* 257; *Reynolds v. Harris*, 14 *Cal.* 681; *McCabe v. Grey*, 20 *Cal.* 509; *Northam v.*

Gordon, 23 *Cal.* 255; Mitchell *v.* Hackett, 25 *Id.* 544; Porter *v.* Liscom, 22 *Id.* 430; Hobbs *v.* Duff, 23 *Id.* 596; Fore *v.* Manlove, 18 *Id.* 436.

PROPERTY ASSIGNED.

62. Chattels not in possession may be assigned. (Cass *v.* N.Y. and N.H. R.R. Co., 1 *E. D. Smith*, 522; Van Hassel *v.* Borden, 1 *Hilt.* 128; Hall *v.* Robinson, 2 *N.Y.* (2 *Comst.*) 293.) Thus, goods to arrive and proceeds thereof may be assigned. (Morgan *v.* Lowe, 5 *Cal.* 325; D'Wolfe *v.* Harris, 4 *Mas. S.C.* 515.) So, a bill of lading may be assigned. (Chandler *v.* Belden, 18 *Johns.* 157.) Or the interest in a prize captured at sea may be assigned. (The "Brutus," 2 *Gall.* 526, 551; The "Sally" and Cargo, 1 *Id.* 401, 409.) Personal property generally may be assigned, and the assignee may sue for its recovery. (Lazard *v.* Wheeler, 22 *Cal.* 139.) So, lottery tickets are assignable. (Shankland *v.* Corporation of Wash., 5 *Pet. S. Ct.* 390.) Or a trade mark. Walton *v.* Crawley, 3 *Blatch.* 448.

63. Rights may be assigned; so a copyright may be assigned. (Roberts *v.* Myers, 13 *Mo. Law. R.* 396; Keane *v.* Wheatley, 9 *Am. Law. R.* 46.) Or literary property of any kind. (Bartlett *v.* Crittenden, 5 *McLean*, 41.) A ferry right, in Indiana, may be assigned. (Bowman *v.* Walker, 2 *McLean*, 376, 393.) So, a license to run a planing machine is assignable. (Wilson *v.* Stolly, 5 *McLean*, 1.) Or a patent right may be assigned, even before it is issued. (Anon., 4 *Opin. Atty-Genl.* 400; Gay *v.* Cornell, 1 *Blatch.* 509.) The assignee of a right of action for violation of a patent takes it subject to all the equities. Parkhurst *v.* Kinsman, 2 *Blatch.* 78.

64. A lease, without specifying therein "and to his assigns," is assignable. (*Averill v. Taylor*, 8 *N.Y.* 44.) Or the interest in a lease may be assigned. (*Damarest v. Willard*, 8 *Cow.* 206; *Willard v. Tilson*, 2 *Hill*, 274; *Van Rensselaer v. Hays*, 19 *N.Y.* 68; *Same v. Ball*, *Id.* 100; affirming *Same v. Smith*, 27 *Barb.* 104.) Or a right of entry for breach of condition may be assigned. *Nicol v. N.Y. and Erie R.R. Co.*, 12 *N.Y.* 121; *Gratz v. Catlin*, 2 *Johns.* 248; *contra*, *Warner v. Bennett*, 31 *Conn.* 468.

SECURITIES MAY BE ASSIGNED.

65. Securities may be assigned. Thus, a guaranty is assignable. (*Small v. Sloan*, 1 *Bosw.* 352.) And, generally, the assignee of a security is subject to the rule that assignee takes subject to all equities. (*Ellis v. Messerve*, 11 *Paige*, 467; *Evans v. Ellis*, 5 *Den.* 640; *L'Amoureux v. Vandenburg*, 7 *Paige*, 316.) So of mortgages assigned; (*Hubbard v. Turner*, 2 *McLean*, 519; *Mickles v. Townsend*, 18 *N.Y.* 475;) which are subject to defeasance; (*Clute v. Robinson*, 2 *Johns.* 595;) or claim to deduction; (*Wood v. Chew*, 13 *How. Pr.* 86;) or to right of redemption. *Sweet v. Van Wyck*, 3 *Barb. Ch.* 647; *Covell v. Tradesman's Bank*, 1 *Paige*, 131.

66. A mortgagee, who has transferred by indorsement on the mortgage or otherwise, and not by deed, his interest in the mortgage and note, is not a necessary party defendant to a petition by the assignee to foreclose the mortgage. (*McGuffey v. Finley*, 20 *Ohio*, 474; *Grant v. Ludlow*, 8 *Ohio St. R.* 1.) Liens of material men are assignable. (The "Boston," *Blatch. & H.* 309.) So a master's lien for freight may be assigned.

Everett *v.* Coffin, 6 *Wend.* 603; Everett *v.* Salters, 15 *Id.* 474; affirmed, 20 *Id.* 267.

67. A legatee of specific securities may sue in his own name to recover them, on obtaining the assent of executor. *Sere v. Coit*, 5 *Abb. Pr.* 481.

II. PARTIES, PLAINTIFF.

68. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this Act. (*Cal. Pr. Act*, § 12; *N.Y. Code*, § 117; *Nash's Ohio Pl.* 12; *Laws of Iowa*, § 2,759; *Oregon*, § 380; *Idaho*, § 12; *Arizona*, § 12; *Nevada*, § 12.) This section of the Practice Act applies, whether the subject matter be legal or equitable in its nature. (*Loomis v. Brown*, 16 *Barb.* 331; *Secor v. Keller*, 4 *Duer*, 419.) And under its provisions all parties interested should join as plaintiffs, except when impracticable, as in cases of joint associations composed of numerous individuals. (*Von Schmidt v. Huntingdon*, 1 *Cal.* 55; *Gorman v. Russell*, 14 *Cal.* 531; *Mandeville v. Riggs*, 2 *Pet. U.S.* 482; *West v. Randall*, 2 *Mas.* 181; *Piatt v. Oliver*, 2 *McLean*, 267; *McKenzie v. L'Amoreaux*, 11 *How. Pr.* 517; *Smith v. Swormstedt*, 16 *Id.* 288; *Roosevelt v. Varnum*, 12 *How. Pr.* 469; *Habicht v. Pemberton*, 4 *Sand*, 659; *Smith v. Lockwood*, 1 *Code R. (N.S.)* 320; *Bouton v. City of Brooklyn*, 15 *Barb.* 375; *Kirk v. Young*, 2 *Abb. Pr.* 453.) If fewer persons are made plaintiffs than there ought to be, it goes to a nonsuit; if a less number of defendants, it is only in abatement. *Lord Mansfield*, quoted in *Converse v. Symmes*, 10 *Mass.* 379.

69. Where there is one connected interest, all must join. (*Owen v. Frink*, 24 *Cal.* 177.) So, parties whose interests rest upon a cause of action common to all, may unite. (2 *Browne Civ. L.* 79 ; 1 *Paine*, 111 ; 3 *Wheat.* 564 ; *Amer. Ins. Co. v. Johnson*, *Blatchf. & H.* 9 ; *Fretz v. Bull*, 12 *How. S. Ct.* 466 ; Hull of a new ship, *Daveis*, 199 ; *Gelston v. Hoyt*, 3 *Wheat.* 246 ; The "Huntress," 1 *Phil.* vii. 282 ; The "Boston," 1 *Sumn.* 328 ; The "Henry Ewbank," *Id.* 400 ; The "A. D. Patchin," 1 *Blatchf.* 414 ; The "Edward Howard," 1 *Newb.* 522 ; *Dean v. Chamberlin*, 6 *Duer*, 691.) But all parties having a common interest must join, except they be out of the jurisdiction of the court. (*Bowman v. Walthen*, 2 *McLean*, 376 ; *Union Bk. of La. v. Stafford*, 12 *How. S. Ct.* 327 ; *Vattier v. Hinde*, 7 *Pet. S. Ct.* 252.) So, where a contract or obligation is made to parties jointly, all parties in interest should be joined. (*McGilvery v. Moorhead*, 3 *Cal.* 267 ; *Treat v. Liddell*, 10 *Cal.* 302 ; *Farni v. Tesson*, 1 *Black.* 309.) And joint obligees must all join in the action as plaintiffs. *Keller v. Blasdell*, 1 *Nev.* 491 ; *Crook v. O'Higgins*, 14 *How. Pr.* 154 ; *Sager v. Nichols*, 1 *Daly*, 1 ; *Mahoney v. Penman*, 4 *Duer*, 603.

70. But if one joint owner of vessel has been paid his share of the demand, the other may sue alone for his. (*Bishop v. Edmiston*, 16 *Abb. Pr.* 466.) For it is held in Massachusetts, where a person is answerable in a personal action to two or more parties, and settles with either of them, it is a severance of the cause of action, and each may bring a several action against him. (*Baker v. Jewell*, 6 *Mass.* 460 ; *Austin v. Walsh*, 2 *Mass.* 405.) So where a factor settles with one of a partnership firm for his share. *Austin v. Walsh*, 2 *Mass.* 405.

71. But no agreement on the part of the partners, without the consent of the factor, after notice of the partnership, and the agreement to sever their interests, will give a right to a several action. (*Peters v. Davis*, 7 *Mass.* 257; *Austin v. Walsh*, 2 *Mass.* 405.) A several action cannot be maintained by one or more of several owners of a vessel for their individual shares. All must join as plaintiffs. (*Coster v. N.Y. and Erie R.R. Co.*, 6 *Duer*, 43; 3 *Abb. Pr.* 332; *Dennis v. Kennedy*, 19 *Barb.* 517; *Buckman v. Brett*, 22 *How. Pr.* 233; 13 *Abb. Pr.* 119; 35 *Barb.* 596; *Bishop v. Emiston*, 13 *Abb. Pr.* 346; *Sherman v. Fream*, 30 *Barb.* 478.) So in a suit on a bill of lading to the plaintiff jointly with another, both must be joined. *Mayo v. Stansbury*, 3 *Cal.* 465.

CREDITORS.

72. To enforce and carry out an assignment for benefit of creditors, all the creditors should join as plaintiffs. (*Bank of British N. A. v. Suydam*, 6 *How. Pr.* 380; *Wakeman v. Grover*, 4 *Paige*, 32.) So, in an action for an accounting and division of proceeds in the hands of assignees, all the creditors should join as parties. *Lentiehon v. Moffatt*, 1 *Edw.* 456; *McPherson v. Parker*, 30 *Cal.* 455; *Joy v. Wirtz*, 1 *Wash. C. Ct.* 417; *Burton v. Smith*, 4 *Wash. C. Ct.* 522; *Murray v. Hay*, 1 *Barb. Ch. R.* 62; *Conro v. Port Henry Iron Co.*, 12 *Barb.* 28; *Dix v. Briggs*, 9 *Paige*, 595; *Brinkerhoff v. Brown*, 6 *Johns. Ch. Rep.* 151.

EJECTMENT.

73. Actions of ejectment must be prosecuted in the name of the real party in interest. (*Ritchie v. Dorland*,

6 *Cal.* 33.) And the person having the legal title to the land, and not the one having an equitable title, is the real party in interest. (*Emeric v. Penniman*, 26 *Cal.* 122 ; *Salmon v. Symonds*, 30 *Id.* 301.) And to entitle him to sue, he must be out of possession. (*Taylor v. Crane*, 15 *How. Pr.* 358.) So, the heir may maintain ejectment where there is no administrator. (*Updegraff v. Trask*, 18 *Cal.* 458 ; approved in *Estate of Woodworth*, 31 *Id.* 604 ; *Soto v. Kroder*, 19 *Id.* 87.) The rule that each of several heirs may sue in ejectment for payment of rent, without joining the others, applies to the case of tenants in common of an incorporeal hereditament of rents charged in fee, and no reversion ; the rents are apportioned in either case. *Cruger v. McCaughry*, 51 *Barb.* 642.

74. The grantee may bring an action to recover lands conveyed while in adverse possession, in the name of the grantor. (*Lowber v. Kelly*, 9 *Bosw.* 494.) But the grantor cannot maintain an action in respect to the title, he having no title left. (*Townsend v. Goelet*, 11 *Abb. Pr.* 187.) But, a trustee of the legal title, holding a quit claim deed to an undivided portion of the land, may maintain ejectment. *Seaward v. Malotte*, 15 *Cal.* 304.

75. The grantee, though seized in fee of only an undivided interest in the particular parcel of land, may recover in ejectment the whole of that parcel, as against all persons except the original co-tenants and their grantees. (*Stark v. Barrett*, 15 *Cal.* 361 ; approved in *Touchard v. Crow*, 21 *Id.* 162 ; *Hart v. Robertson*, 21 *Cal.* 348 ; *Mahoney v. Van Winkle*, 21 *Id.* 583 ; *Reed v. Spicer*, 27 *Id.* 64 ; *Carpentier v. Webster*, 27 *Id.*

560; *Tevis v. Hicks*, *Cal. Sup. Ct. Jul. T.* 1869; citing 2 *Bouvier's Inst.* 314.) See Tenants in Common, *Post No.* 128, *et seq.* See, also, as to "right of possession," *Moore v. Tice*, 22 *Cal.* 516; *Blum v. Robertson*, 24 *Id.* 147; *Gates v. Salmon*, 28 *Cal.* 320.

EXECUTORS, TRUSTEES, ETC., MAY SUE.

76. An executor, or administrator, or trustee of an express trust, or person expressly authorized by statute, may sue without joining with him the person or persons for whose benefit the action is prosecuted. (*Cal. Pr. Act*, § 6; *Laws of Cal.* 1854, p. 84; *N.Y. Code*, § 113; *Nash's Ohio Pl.* § 27; *Laws of Iowa*, § 2,758; *Oregon*, § 29; *Idaho*, § 6; *Nevada*, § 6; *Arizona*, § 6.) And all to whom letters of administration have been issued should join. (*Scranton v. Farmers Bank of Rochester*, 33 *Barb.* 531; *Moore v. Willett*, 2 *Hilt.* 522.) Where there are several executors they must all join, even though some renounce. (9 *Co.* 37; 1 *Chitt. Pl.* 13; 1 *Saund.* 291; 3 *Bac.* 32; *Toll.* 68; *Bodle v. Hulse*, 5 *Wend.* 313.) But where there are two administrators, and only one acting, he may sue alone in his own right on a guaranty executed since decedent's death. *Packer v. Willson*, 15 *Wend.* 343.

77. The provision that an executor may sue, without joining with him the person for whose benefit the action is prosecuted, has no application in case of an action for the construction of a will. (*Hobart College v. Fitzhugh*, 27 *N.Y.* 130.) Executors have the right to institute actions under the general authority conferred by statute. *Curtis v. Sutter*, 15 *Cal.* 259; *Halleck v. Mixer*, 16 *Cal.* 579; *Teschmacher v. Thompson*, 18 *Cal.* 20.

78. It has been held in New York that an executor may sue in two different capacities, as executor and devisee, where the causes of action are such as may be joined. (*Armstrong v. Hall*, 17 *How. Pr.* 76; compare *Pugsley v. Aitken*, 11 *N.Y.* 494.) In actions upon joint and several contracts, the administrator cannot be joined with the survivor, because one is *de bonis testatoris*, and the other *de bonis propriis*. *Humphrey v. Crane*, 5 *Cal.* 173; approved in *May v. Hanson*, 6 *Cal.* 642; *Gray v. Palmer*, 9 *Cal.* 616.

79. The executor or administrator is a necessary party in actions concerning the property, real and personal, belonging to the estate of the deceased; (*Harwood v. Marye*, 8 *Cal.* 580; *Curtis v. Herrick*, 14 *Id.* 117; *Soto v. Kroder*, 19 *Id.* 87; *Ellison v. Halleck*, 6 *Id.* 393;) he being in possession of such property. (*Id.*) An administrator can maintain an action for the wrongful conversion or embezzlement of property of the intestate. (*Jahns v. Nolting*, 29 *Cal.* 507; *Beckman v. McKay*, 14 *Id.* 250; referred to in *James v. Nolting*, 29 *Cal.* 512; *Sheldon v. Hoy*, 11 *How. Pr.* 11.) Or he may maintain an action in replevin. (*Halleck v. Mixer*, 16 *Cal.* 575.) An administrator or executor can alone maintain an action of damages for wrongfully causing the death of a person. *Kramer v. Market St. R.R. Co.*, 25 *Cal.* 435; *Oldfield v. N.Y. and Harlem R.R. Co.*, 3 *E. D. Smith*, 303; *Safford v. Drew*, 3 *Duer*, 634; *Yertore v. Wiswell*, 16 *How. Pr.* 8; *Quinn v. Moore*, 15 *N.Y.* 432; *Keller v. N.Y. Cent. R.R. Co.*, 17 *How. Pr.* 102; *Lynch v. Davis*, 12 *How. Pr.* 323.

80. An administrator may maintain ejectment. (*Curtis v. Herrick*, 14 *Cal.* 117; *Mosher v. Yost*, 33

Barb. 277.) Or an action for trespass on the real estate of the testator. (*Haight v. Green*, 19 *Cal.* 113; *Rockwell v. Sanders*, 19 *Barb.* 473.) Or an action to quiet title to lands of deceased. *Curtis v. Sutter*, 15 *Cal.* 259.) Or may foreclose a mortgage. *Harwood v. Marye*, 8 *Cal.* 580.

81. An administrator may maintain an action on a note made payable to him as administrator. (*Corcoran v. Doll*, 32 *Cal.* 82; *Cooper v. Kerr*, 3 *Johns. Cas.* 606; *Eagle v. Fox*, 28 *Barb.* 473; *Robinson v. Crandall*, 9 *Wend.* 425; *Bright v. Currie*, 5 *Sand.* 433; *Merritt v. Seaman*, 2 *Seld.* 168.) It was held in Massachusetts that an administrator of a deceased promisee, and the surviving promisee of a promissory note, cannot join in bringing an action on the note. *Smith v. Franklin*, 1 *Mass.* 480.

82. It was held that an administrator *de bonis non*, cannot support an action in his own name for the price of goods of his intestate, sold by the previous administrator. *Calder v. Pyfer*, 2 *Cranch C. Ct.* 530.

FATHER OR MOTHER MAY MAINTAIN ACTION.

83. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child; and a guardian for the injury or death of his ward. (*Cal. Pr. Act*, § 11; *Laws of Cal.* 1862, p. 447; *Laws of Iowa*, § 2,792; *Laws of Oregon*, § 34; *Laws of Idaho*, § 11; *Code of Arizona*, § 11.) An action for the loss of a child, killed by the negligence or misconduct of a railroad company, was held properly brought in the name of both parents, and

that the joinder of the mother was not error. (*Pennsylvania Railroad Company v. Zebe and Wife*, 37 *Penn.* 420.) A father depositing money in the name of his children, may sue in his own name for its recovery. *Geary v. Page*, 9 *Bosw.* 290.

FORECLOSURE OF MORTGAGES AND MECHANICS' LIENS.

84. All persons interested in the estate should be made parties. (*Revalk v. Kramer*, 8 *Cal.* 66; *Marks v. Marsh*, 9 *Id.* 96; *Hocker v. Reas*, 18 *Id.* 650; approved in *Van Winkle v. Stow*, 25 *Cal.* 459; and *Horn v. Jones*, 28 *Id.* 204; *Whitney v. Higgins*, 10 *Cal.* 551; *Montgomery v. Tutt*, 11 *Cal.* 307; *DeLeon v. Higuera*, 15 *Id.* 483; *Goodenow v. Ewer*, 16 *Id.* 461; approved in *Boggs v. Hargrave*, *Id.* 559; *San Francisco v. Lawton*, 18 *Cal.* 475; *Burton v. Lies*, 21 *Id.* 87; *Brooks v. Tichenor*, *Cal. Sup. Ct., Oct. T.*, 1864; *Heyman v. Lowell*, 23 *Id.* 106; *Carpentier v. Williamson*, 25 *Id.* 159; *Skinner v. Buck*, 29 *Id.* 253; *Wilson v. Castro*, 31 *Id.* 420; *Bludworth v. Lake*, 33 *Id.* 256; *Alexander v. Greenwood*, 24 *Id.* 505; *Kearsing v. Killian*, 18 *Id.* 491; *Harlan v. Ruckerby*, 24 *Cal.* 562; *Finley v. Bank of U.S.*, 11 *Wheat.* 304; *Piatt v. Oliver*, 2 *McLean*, 267; *Matcalm v. Smith*, 6 *McLean*, 416; *Upham v. Brooks*, 2 *Story, C. Ct.* 623; *Johnson v. Hart*, 3 *Johns. Cas.* 322; *Bristol v. Morgan*, 3 *Edw. Ch. R.* 142.) Material men and mechanics may join in an equitable action to establish and enforce their liens. *Barber v. Reynolds*, 33 *Cal.* 497; *Fitch v. Creighton*, 24 *How. S. Ct.* 159.

FORFEITURE AND PENALTY.

85. Actions to recover a forfeiture or penalty must in general be brought in the name of the Government.

(*Matthews v. Offley*, 3 *Sumn. C. Ct.* 115; but see *Cloud v. Hewitt*, 3 *Cranch. C. Ct.* 199; *United States v. The "Platner,"* 1 *Newb. S. Ct.* 262; *United States v. Bougher*, 6 *McLean*, 277; *Terrett v. Atwill*, 4 *N. Y. Leg. Obs.* 294.) It is however held in actions on a statutory penalty, that the party entitled to the benefit is the proper party plaintiff. *Thompson v. Howe*, 46 *Barb.* 287.

HUSBAND AND WIFE.

86. In actions on a contract made by the wife, the husband and wife must join, except in cases specified in the statute. (*Snyder v. Webb*, 3 *Cal.* 83.) They should also join in suit for words spoken, slanderous *per se*. (*Klein v. Hentz*, 2 *Duer*, 633; *Williams v. Holdredge*, 22 *Barb.* 396; *Wilson v. Goit*, 17 *N. Y.* 442.) In an action against steamer for breach of contract to carry the wife to New York, *via* Nicaragua, though based on a contract, sounds in tort, and the wife is a proper and necessary plaintiff. (*Warner v. "Uncle Sam,"* 18 *Id.* 526; but see *Shelden v. "Uncle Sam,"* 18 *Id.* 26.) For the recovery of the homestead both must join. (*Poole v. Gerrard*, 6 *Cal.* 71; *Cook v. Klink*, 8 *Cal.* 347.) For additional authorities on the joinder of husband and wife, consult *Smith v. Kearney* 9 *How. Pr.* 466; *Ackley v. Tarbox*, 29 *Barb.* 512; *Van Buren v. Cockburn*, 2 *C. R.* 63; *Woods v. Thompson*, 11 *How. Pr.* 184; *Rusher v. Morris*, 9 *How. Pr.* 266; *Ingraham v. Baldwin*, 12 *Barb.* 9; *Harley v. Ritter*, 9 *Abb. Pr.* 400; *Hillman v. Hillman*, 14 *How. Pr.* 456; *Ripple v. Gilborn*, 8 *How. Pr.* 456; *Jacques v. Short*, 20 *Barb.* 269; *Avogadro v. Bull*, 4 *E. D. Smith*, 384; *Barton v. Draper*, 5 *Duer*, 130; *Klein v. Hentz*, 2 *Duer*, 633; *Williams v. Holdredge*, 22 *Barb.* 396.

87. In suit for damages to common property, the husband must sue alone. (*Shelden v. Stmr. "Uncle Sam,"* 18 *Cal.* 526.) So, for trespass on husband's separate property, he should sue alone. (*Dunderdale v. Grymes*, 16 *How. Pr.* 195.) Or for injury to common property, by deceit or otherwise. (*Barrett v. Tewksbury*, 18 *Cal.* 334.) In New York, in actions for breaking into dwelling house occupied by the wife, and for hindering her in the enjoyment of the house, the husband must sue alone. *Dunderdale v. Grymes*, 16 *How. Pr.* 195.

INFANT MAY SUE BY GUARDIAN.

88. When an infant is a party, he shall appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a county judge. (*Cal. Pr. Act*, § 9; *N.Y. Code*, § 115; *Oregon*, § 31; *Idaho*, § 9; *Arizona*, § 9.) By the laws of Ohio and Iowa, the action must be brought by the guardian or next friend; but the Court has power to dismiss it, if it is not for the benefit of the infant, or to substitute the guardian of the infant or any person as next friend. (*Nash's Ohio P.* 15; *Laws of Iowa*, § 2,777.) By the Ohio Code, "the guardian or next friend is liable for all costs, and when insolvent the Court may require security for costs. *Nash's Ohio P.* § 31.

89. A general guardian of an infant has a right to institute an action on behalf of his ward, and a mistake designating him as guardian *ad litem* is of no importance. (*Spear v. Ward*, 20 *Cal.* 659; approved in *Fox v. Minor*, 32 *Cal.* 119.) But he cannot sue in his own name for money due the infant. *Fox v. Minor*, 32 *Cal.* 111.

GUARDIAN, HOW APPOINTED.

90. The guardian shall be appointed as follows : When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of a relative or friend of the infant. (*Cal. Pr. Act*, § 10, Subd. 1; *N.Y. Code*, § 116; *Laws of Idaho*, § 10; *Code of Arizona*, § 10.) By the laws of Oregon such application must be made within fifteen days. (*Laws of Oregon*, § 32.) The appointment may be made upon the application of the infant, if of the age of fourteen years, and he apply within twenty days after the return of the summons. If he be under that age, or neglect to apply, the appointment may be made upon the application of any friend of the infant, or on the application of the plaintiff in the action. (*Id.* § 33; see, also, *Nash's Ohio P.* p. 16, § 32-3.) The laws of Iowa substantially conform with the Ohio Code. *Laws of Iowa*, §§ 2,779, 2,780.

91. The provisions of the statute only apply where there is no general guardian, or where he does not act. (*Gronfier v. Puymiro*, 19 *Cal.* 629; approved in *Fox v. Miner*, 32 *Cal.* 119; and see *Spear v. Ward*, 20 *Id.* 676.) Guardian *ad litem* cannot be appointed for an infant over fourteen years old, without his consent. 8 *Abbott's Pr.* 44.

INJUNCTION.

92. In general, all persons interested in obtaining an injunction must be made parties to such action. (*Smith v. Lockwood*, 13 *Barb.* 218.) So, different persons affected by a nuisance may join in suit to restrain a

party for permitting or continuing such nuisance. *Peck v. Elder*, 3 *Sand.* 126; *Murray v. Hay*, 1 *Barb. Ch. Rep.* 62; *Reed v. Gifford*, *Hopk.* 419; *Brady v. Weeks*, 3 *Abb. Pr.* 157; *contra*, *Hudson v. Madison*, 35 *Eng. Ch. R.* 352.

INJURY TO REAL PROPERTY.

93. A remainder man in fee may maintain an action for injury to the inheritance; (*Van Deusen v. Young*, 29 *Barb.* 9;) and may in proper cases enjoin to prevent the erection of a building. (*Lamport v. Abbott*, 12 *Abb. Pr.* 340.) Or a lessee may sue for injury to the tenement. *Ulrich v. McCabe*, 1 *Hilt.* 251.

94. The equitable owner of property, in possession, may maintain an action for damage to the freehold. (*Rood v. N.Y. and Erie R.R. Co.*, 18 *Barb.* 80.) Or he may sue for trespass. (*Houser v. Hammond*, 39 *Barb.* 89; *Safford v. Hynds*, *Id.* 625; *Pierce v. Hall*, 41 *Id.* 142; *Sparks v. Leavy*, 19 *Abb. Pr.* 364.) Or the owner, redeeming under sale on execution, may sue for waste intermediate between sale and his redemption. (*Thomas v. Crofut*, 4 *Kern.* 474.) So an action can be maintained by the mortgagee of real estate to recover damages for wrongful and fraudulent injuries done to the mortgaged property, by which security of the mortgage has been impaired. *Robinson v. Russell*, 24 *Cal.* 472.

INJURY TO PERSONAL PROPERTY.

95. In actions for injury to personal property the person in possession is the proper party plaintiff. (*Harrison v. Marshall*, 4 *Smith*, 271.) And in actions for injury to the person or to person and property, the party sustaining the injury is the proper party plaintiff.

(*Wiggins v. McDonald*, 18 *Cal.* 126; *Summers v. Farish*, 10 *Id.* 347; affirmed in *Prader v. Purkett*, 13 *Id.* 591; *Browner v. Davis*, 15 *Id.* 11.) And by indemnifying the actual plaintiff, an insurance company may bring an action against the wrong doer in a case of collision and loss. *Mut. Ins. Co. of Buffalo v. Eaton*, 11 *Leg. Obs.* 140.

96. Joint owners of a chattel should join in an action for injury to it. And the non-joinder can be taken advantage of only by plea in abatement. (*Dubois v. Glaub*, 52 *Penn.* 238; *D'Wolf v. Harris*, 4 *Mas.* 515.) In actions for the conversion of personal property, the party having legal title to the chattel is the proper party plaintiff. (*Paddon v. Williams*, 2 *Abb. Pr. (N.S.)* 88.) And the purchaser of a chattel may maintain trover in his own name. *McGuion v. Worden*, 3 *E. D. Smith*, 355; *Hall v. Robinson*, 2 *Comst.* 293; *Kellogg v. Church*, 3 *C. R.* 53; *Cass v. N.Y. and N.Y. R.R. Co.*, 1 *E. D. Smith*, 522; *Robinson v. Weeks*, 1 *C. R. (N.S.)* 311; *Van Hassel v. Borden*, 1 *Hill.* 128.

LEGACY.

97. Where a legatee, being the son of the testator, died in the testator's lifetime, leaving children, it was held that all the children must join in an action for the recovery of the legacy. (*Parks v. Knowlton*, 14 *Pick.* 432; *Pray v. Belt*, 1 *Pet. S. Ct.* 670.) Where some of several heirs destroy the title deeds of the ancestor, the other heirs may join in an action against them. *Daniels v. Daniels*, 7 *Mass.* 135.

MARRIED WOMAN MAY SUE.

98. When a married woman is a party, her husband

shall be joined with her, except: *First*, When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone. *Cal. Pr. Act*, § 7, Subd. 1; *Laws of Cal.* 1867-8, 550; *N.Y. Code*, § 114; *Iowa*, § 2,771; *Oregon*, § 30; *Idaho*, § 7; *Arizona*, § 7; *Frisbie v. Whitney*, *Cal. Sup. Ct.*, *Jul. T.*, 1869; citing *Snyder v. Webb*, 3 *Cal.* 83; *McKune v. McGarvey*, 6 *Cal.* 497; affirmed, 7 *Cal.* 458; 29 *Cal.* 566; *Van Maren v. Johnson*, 15 *Cal.* 308; approved in *Corcoran v. Doll*, 32 *Cal.* 90; and *Kays v. Phelan*, 19 *Id.* 128; *Calderwood v. Peyser*, 31 *Cal.* 333; see also *Corcoran v. Doll*; *Cook v. Rawdon*, 6 *How. Pr.* 233; *Smith v. Kearney*, 9 *Id.* 466; *Hulbert v. Newell*, 4 *Id.* 93; *Hillman v. Hillman*, 14 *Id.* 456; *Darby v. Callaghan*, 16 *N.Y.* 71; *Sherman v. Burnham*, 6 *Barb.* 403; *Newbury v. Garland*, 31 *Id.* 121; *Walker v. Swayzee*, 3 *Abb. Pr.* 136; *Klen v. Gibney*, 24 *How. Pr.* 31; *Smart v. Comstock*, 24 *Barb.* 441; *Darby v. Callaghan*, 16 *N.Y.* 71; *Merchants' Ins. Co. v. Hinman*, 34 *Barb.* 410.

99. If a promissory note is the separate property of the wife, she may bring the action thereon in her own name, or the husband and wife may sue jointly. *Corcoran v. Doll*, 32 *Cal.* 82; *Howland v. Fort Edward Paper Mill Co.*, 8 *How. Pr.* 505; *Spies v. Accessory Transit Co.*, 5 *Duer*, 662; *Ackley v. Tarbox*, 29 *Barb.* 512; 31 *N.Y.* 564; *Roberts v. Carlton*, 18 *How. Pr.* 416; *Smart v. Comstock*, 24 *Barb.* 411; *Dillaye v. Parks*, 31 *Barb.* 132; *Devin v. Devin*, 17 *How. Pr.* 514; *Willis v. Underhill*, 6 *How. Pr.* 396; *Palmer v. Davis*, 28 *N.Y.* 242; *Fox v. Duff*, 1 *Daly*, 166.

100. In New York, a husband and wife cannot maintain an action in their joint names, to recover for

the conversion of the separate property of the wife. She must sue by her next friend. (*Smith v. Kearney*, 9 *How. Pr.* 466.) So held, also, in partition of property willed to the wife. (*Brownson v. Gifford*, 8 *How. Pr.* 389.) But in an action by the wife for money due to her as her separate property, he is properly joined with her as plaintiff. *Van Maren v. Johnson*, 15 *Cal.* 308; approved in *Kays v. Phelan*, 19 *Cal.* 128; and *Corcoran v. Doll*, 32 *Cal.* 90.

101. When the action is between herself and her husband, she may sue or be sued alone. (*Cal. Pr. Act*, § 7, Subd. 2; *Laws of Cal.* 1867-8, p. 550; *N.Y. Code*, § 114; *Iowa*, § 2,771; *Oregon*, § 30; *Idaho*, § 7; *Arizona*, § 7.) That a wife may sue her husband in equity, see (*Galland v. Galland*, *Cal. Sup. Ct., Jul. T.*, 1869.) It is no longer necessary under this section for the wife to sue by *prochain ami*. (*Kashaw v. Kashaw*, 3 *Cal.* 312; *Goodall v. McAdam*, 14 *How. Pr.* 385; *Phillips v. Burr*, 4 *Duer*, 113; *Bergman v. Howell*, 3 *Abb. Pr.* 130.) But by the Ohio Code, a married woman in every action, except for a divorce or alimony, shall sue or be sued by her next friend. *Nash's Ohio Pl.* 14.

102. In an action between herself and husband, a married woman must sue alone. (*Kashaw v. Kashaw*, 3 *Cal.* 312.) So in New York, in actions for assault and battery committed upon her. (*Mann v. Marsh*, 35 *Barb.* 68; 21 *How. Pr.* 372; *Weber v. Moritz*, 11 *Abb. Pr.* 113.) But she cannot sue her husband for assault and battery. (*Longendyke v. Longendyke*, 44 *Barb.* 366.) Nor for libel. (*Freethy v. Freethy*, 42 *Barb.* 641.) Nor for slander. (*Id.*) Nor can she sue her husband in ejectment. (*Gould v. Gould*, 29 *How. Pr.*

441.) But she may sue him for alimony, without bringing an action for divorce. (*Galland v. Galland*, *Cal. Sup. Ct.*, *Jul. T.*, 1869.) For additional authorities, see Chapter ii, Jurisdiction, note 61.

103. In the exceptional cases mentioned in § 7 of the Cal. Pr. Act, the privilege is accorded to the wife to sue or defend alone, or in connection with her husband, at her election. *Van Maren v. Johnson*, 15 *Cal.* 308; *Leonard v. Townsend*, 26 *Cal.* 435; see *Wilson v. Wilson*, *Cal. Sup. Ct.*, *Oct. T.*, 1868.

PARTNERS AS PLAINTIFFS.

104. In actions for the benefit of the partnership, all partners whether published or dormant (special partners excepted), must be parties to the action. This is the general proposition, but in some states this question of practice is changed or modified by statute. (*Clark v. Miller*, 4 *Wend.* 629; *Clarkson v. Carter*, 3 *Cow.* 84; *Leveck v. Shaftoe*, 2 *Esp.* 468; *Mitchell v. Doll*, 2 *Harr. & Gill.* 171.) When one partner is a member of two firms, one of which sues the other, he may elect to be either plaintiff or defendant. *Cole v. Reynolds*, 18 *N.Y.* 76.

105. In New York, a dormant partner is a necessary party plaintiff. (*Secor v. Keller*, 4 *Duer*, 416; but see *Hurlbut v. Post*, 1 *Bosw.* 28; *Brown v. Birdsall*, 29 *Barb.* 549; *Van Valen v. Russell*, 13 *Barb.* 590.) Although in a limited partnership the general partners alone can sue and be sued, yet in suit by a creditor for a receiver and distribution, the limited partner ought to be joined. *Schulten v. Lord*, 4 *E. D. Smith*, 206; *Lachaise v. Marks*, *Id.* 610.

106. All partners should be joined in an action for co-partnership debt. (*Hyde v. Van Valkenburgh*, 1 *Daly*, 416; *Bridge v. Payson*, 5 *Sand.* 210; *Mayhew v. Robinson*, 10 *How. Pr.* 162; *Briggs v. Briggs*, 20 *Barb.* 477; 15 *N.Y.* 471; *Sweet v. Bradley*, 24 *Barb.* 549.) But an agreement to divide the gross earnings of a venture, does not constitute the parties to it partners. *Wheeler v. Farmer*, *Cal. Sup. Ct., July T.*, 1869; citing *Paterson v. Blanchard*, 1 *Seld.* 189; *Story in Part*, § 34; and cases there cited in *note* 3.

107. In actions for the recovery of the price of goods sold by a partnership, all the partners must join. It cannot be maintained in the name of one, although he is the general agent of the firm. (*Halliday v. Doggett*, 6 *Pick.* 359.) Partners may maintain joint actions against inn keepers for loss of goods. (*Needles v. Howard*, 1 *E. D. Smith*, 54.) Where two or more are deceived and injured in the purchase of real estate for partnership purposes, they may join in an action to recover damages for the deceit and injury. *Medbury v. Watson*, 6 *Met.* 246.

POLICY OF INSURANCE.

108. The mortgagee of a policy of insurance is the owner, and can alone maintain an action upon it. (*Ripley v. Astor Ins. Co.*, 17 *How. Pr.* 444; *Ennis v. Harmony Fire Ins. Co.*, 3 *Bosw.* 516; but see *Bidwell v. N. W. Ins. Co.*, 19 *N.Y.* 179; *Poole v. Chenango Co. Mut. Ins. Co.*, 3 *Comst.* 53.) But the party to whom the loss is made payable in the policy may sue in his own name, if not assigned, sold, or mortgaged before loss. *Frink v. Hampden Ins. Co.*, 45 *Barb.* 384.

PRINCIPAL AS PLAINTIFF.

109. A principal, and not the agent, is the proper party to sue or be sued. (*Erickson v. Compton*, 6 *How. Pr.* 471; *Union India Rubber Co. v. Tomlinson*, 1 *E. D. Smith*, 364; *St. John v. Griffith*, 13 *How. Pr.* 59; *Fish v. Wood*, 4 *E. D. Smith*, 327; *Haight v. Sahler*, 30 *Barb.* 218; *Stanton v. Camp*, 4 *Barb.* 274; *Lane v. Columbus Ins. Co.*, 2 *C.R.* 65.) As to the right of undisclosed principal to sue, see *Morgan v. Reed*, 7 *Abb. Pr.* 215; *Van Lien v. Byrnes*, 1 *Hilt.* 133.

110. A principal may sue on a contract made by his agent, but he must show the agency and power of agent to contract. (*Ruiz v. Norton*, 4 *Cal.* 358; *Thurn v. Alta Telegraph Co.*, 15 *Id.* 472; *Brooks v. Minturn*, 1 *Id.* 482.) The real owner of the goods may maintain an action in his own name, and parol proof is admissible to show that third persons to whom the orders were addressed were merely plaintiff's agents. (*Union India Rubber Co. v. Tomlinson*, 1 *E. D. Smith*, 364.) So a principal may waive the tort against his factor, and bring an action to compel him to account. *Lubert v. Chauviteau*, 3 *Cal.* 462.

AGENT AS PLAINTIFF.

111. An agent ordinarily cannot sue in his own name in respect to the subject matter of his agency. (*Lineker v. Ayeshford*, 1 *Cal.* 75; *Phillips v. Henshaw*, 5 *Id.* 509.) A note sued on payable to plaintiff, as agent, does not take away his right of action thereon. (*Ord v. McKee*, 5 *Cal.* 515; *Considerant v. Brisbane*, 22 *N.Y.* 389; *Reilly v. Cook*, 22 *How. Pr.* 93.) If the plaintiff

have the legal interest in the money sued for, the Court will not entertain an objection that other persons for whom he is agent ought to sue. *Salmon v. Hoffman*, 2 *Cal.* 138.

PROMISSORY NOTES.

112. One having an absolute right to money due on a note is the real party in interest. (*Cummings v. Morris*, 3 *Bosw.* 560; *Selden v. Pringle*, 17 *Barb.* 460; *Hastings v. McKinley*, 1 *E. D. Smith*, 273.) So, the bearer may bring an action on a promissory note in his own name. (*Locket v. Davis*, 3 *McLean*, 101.) Or the holder may sue. *Halsted v. Lyon*, 2 *McLean*, 226.

113. Possession is *prima facie* evidence of ownership. (*McCann v. Lewis*, 9 *Cal.* 246; cited in 32 *Cal.* 88; *Price v. Dunlap*, 5 *Cal.* 483; *Gushee v. Leavitt*, 5 *Id.* 160; *James v. Chalmers*, 5 *Sand.* 52; affirmed, 2 *Seld.* 209; *Mottram v. Mills*, 1 *Sand.* 37; *Wiltzie v. Northam*, 5 *Bosw.* 428; *Farrington v. Park Bk.*, 39 *Barb.* 645.) The holder of a promissory note is presumed to be the owner, or real party in interest. The fact that the plaintiff has not the actual possession of the note sued upon does not affect his right to recover upon it. (*Selden v. Pringle*, 17 *Barb.* 468; *Hastings v. McKinsey*, 1 *E. D. Smith*, 273.) And if plaintiff owns a promissory note, he may sue on it, although it be in possession of defendant. *McClusky v. Gerhauser*, 2 *Nevada*, 47.

114. A party holding a promissory note, as trustee for himself and others, may recover. (*Palmer v. Goodwin*, 5 *Cal.* 458; *Hamilton v. McDonald*, 18 *Cal.* 128;

Fletcher *v.* Derrickson, 3 *Bosw.* 81; but see Parker *v.* Totten, 10 *How. Pr.* 233; White *v.* Brown, 14 *How. Pr.* 282; Clarke *v.* Phillips, 21 *How. Pr.* 87.) So, a *bona fide* indorsee may recover. (Cummings *v.* Morris, 3 *Bosw.* 560; Potter *v.* Chadsey, 16 *Abb. Pr.* 146; Smith *v.* Richmond, 19 *Cal.* 625.) Or the indorsee of a note for a consideration to be paid after collection may maintain action. (Cummings *v.* Morris, 25 *N.Y.* 625.) As to transferee without consideration, see Killmore *v.* Culver, 24 *Barb.* 656.

QUO WARRANTO.

115. The claimant of the office may join with the People, as plaintiff. People *v.* Ryder, 12 *N.Y.* 433; affirmed, 2 *Kern.* 433; People *v.* Walker, 23 *Barb.* 304.

SHERIFF.

116. A sheriff who levies an attachment, by *virtue* of the process of attachment cannot maintain an action in his own name for the recovery of the debt. Sublette *v.* Melhado, 1 *Cal.* 105.

STATE.

117. In the absence of any statute to that effect, the State cannot be sued. (People *v.* Talmage, 6 *Cal.* 256; see, also, Nougues *v.* Douglass, 7 *Cal.* 65.) In an action to annul a patent for land, the State, as well as persons having a right to the land, may be joined as plaintiffs. (People *v.* Morrill, 26 *Cal.* 336; approved in Wilson *v.* Castro, 31 *Id.* 427.) If the State has no interest in the matter, the action cannot be sustained. (People *v.* Stratton, 25 *Cal.* 244.) Actions for the

recovery of an auctioneer's duty are properly brought in the name of the State. *State v. Poulterer*, 16 *Cal.* 514; see *State v. Conkling*, 19 *Id.* 509.

SURETIES.

118. A surety on an undertaking, who had paid the amount of his liability, was entitled to recover back the amount. (*Garr v. Martin*, 1 *Hilt.* 358; see *Jewett v. Crane*, 13 *Abb. Pr.* 97; 35 *Barb.* 208.) Co-sureties, who pay the debt of their principal by giving their joint and several notes therefor, must join in a suit against him for reimbursement. (*Doolittle v. Dwight*, 2 *Met.* 561; see *Chandler v. Brainard*, 14 *Pick.* 285; *Appleton v. Bascom*, 3 *Met.* 169.) A surety paying a debt for which several persons are liable in distinct proportions as principals, must proceed by a several action against each, upon an implied *assumpsit*. *Chipman v. Morrill*, 20 *Cal.* 130.

TENANTS IN COMMON.

119. All persons holding as tenants in common or co-purchasers may jointly or severally sue or be sued in any action for the enforcement or protection of their rights. (*Laws of Cal.* 1857, p. 62.) For quieting title to real property. (*Laws of Cal.* 1857, p. 158.) Or tenants in common may all unite in an action for the possession of real property; and an executor of a deceased tenant in common may unite with the co-tenants of his testator in such actions. *Touchard v. Keyes*, 21 *Cal.* 202; approved in *Gotter v. Fetts*, 30 *Cal.* 484.

120 All tenants in common may unite in prosecuting an action for the possession of the common property.

(*Bullion Mining Co. v. Cræsus G. and S. M. Co.*, 2 *Nev.* 168.) Or for trespass on land. (*Sparks v. Leavy*, 19 *Abb. Pr.* 304; *Van Deusen v. Young*, 29 *Barb.* 9; *Decker v. Livingston*, 15 *Johns.* 481; *Austin v. Hall*, 13 *Id.* 286.) Or for use and occupation, all tenants in common should be joined as plaintiffs. (*Porter v. Bleiler*, 17 *Barb.* 149; *Rice v. Hallanbeck* 19 *Id.* 664.) So, one of several heirs may sue for proportionate part of rents. (*Jones v. Felch*, 3 *Bosw.* 63.) But pending the tenancy in common, one tenant is not liable to account to others for use and occupation. (*Woolever v. Knapp*, 18 *Barb.* 265; *Dresser v. Dresser*, 40 *Barb.* 300.) Devisees in remainder may maintain joint action against executor of a tenant for life, for rents due after termination of life interest. (*Marshall v. Moseley*, 21 *N.Y.* 280.) A simular rule as to chattels held in common, all must be joined as plaintiffs. (*Coster v. N.Y. and Erie R. R. Co.*, 6 *Duer*, 43; 3 *Abb. Pr.* 332.) Tenants in common may maintain a joint action for the rent due under a sealed lease of the joint estate, although it be stipulated that half of the rent shall be paid to each. *Wall v. Hinds*, 4 *Gray*, 256.

121. Tenants in common must join in an action for conversion of chattels. (*Whitney v. Stark*, 8 *Cal.* 514; *Rice v. Hollenbeck*, 19 *Barb.* 664; *Gock v. Kenneda*, 29 *Id.* 120.) Tenants in common must join in an action for an entire injury done to the partnership property, either in tort, or *assumpsit* when tort is waived. (*Gilmore v. Wilbur*, 12 *Pick.* 120.) One tenant in common may sue another who sells and destroys the common goods. (*Yamhill Bridge Co. v. Newby*, 1 *Or.* 173.) But for injury to the *common* interest it seems in New York all must sue. (*Tanner v. Hills*, 44 *Barb.* 428.)

One tenant in common may sue a party in possession by adverse claim, and recover possession. (*Collier v. Corbett*, 15 *Cal.* 183.) Or they may sue jointly to recover possession of all their several undivided interests. *Goller v. Fett*, 30 *Cal.* 481.

122. One of several tenants in common may sue alone for his moiety. (*Covillaud v. Tanner*, 7 *Cal.* 38.) Or in equity may obtain a partition. (*Tenney v. Stebbins*, 28 *Barb.* 290; *Tripp v. Riley*, 15 *Barb.* 333; *Beebee v. Griffing*, 4 *Kern.* 235.) When one tenant in common sells the right to a stranger to cut timber off the common property, another tenant in common of the same property cannot maintain replevin for the timber after it is cut. (*Alford v. Bradeen*, 1 *Nev.* 228.) After severance of fund held in common, each party may maintain separate action for his ascertained share. *Gen. Mut. Ins. Co. v. Benson*, 5 *Duer*, 168.

123. Joint owners of vessels are tenants in common, and must sue jointly. (*Buckman v. Brett*, 22 *How. Pr.* 233; 13 *Abb. Pr.* 119; see *Bishop v. Edmiston*, 13 *Abb. Pr.* 340.) All joint owners of vessels should unite in suit for freight. (*Merritt v. Walch*, 32 *N.Y.* 685; *Donnell v. Walsh*, 33 *N.Y.* 43.) So, joint charterers are joint owners *pro hac vice*. *Sherman v. Fream*, 30 *Barb.* 478; *Coster v. N.Y. and Erie R.R. Co.*, 6 *Duer*, 43; *Dennis v. Kennedy*, 19 *Barb.* 517.

JOINT TENANTS.

124. Joint tenants must join in an action for possession of lands jointly held. (*Laws of Cal.* 1857, p. 62; *Id.* 1867, p. 158; *Dewey v. Lambier*, 7 *Cal.* 347; *Cohen v. Davis*, 20 *Id.* 187; *Alford v. Davin*, 1 *Nev.* 207.)

Any two or more persons, claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, co-partners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same. *Laws of Cal.* 1867-8, p. 158.

TRUSTEES AS PLAINTIFFS.

125. A trustee of an express trust within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. (*Cal. Pr. Act*, § 6; *Laws of Cal.* 1854, p. 84; *N.Y. Code*, § 113; *Nash's Ohio Pl.* § 27; *Iowa*, § 2,758; *Oregon*, § 29; *Idaho*, § 6; *Arizona*, § 6.) Such a trustee may sue without joining with him the person for whose benefit the action is brought. *Mead v. Mitchell*, 5 *Abb. Pr.* 106.

126. Trustees of an express trust are as follows: A mercantile factor. (*Grinnell v. Schmidt*, 2 *Sand.* 706.) An agent contracting as agent without disclosing name of principal. (*Morgan v. Reid*, 7 *Abb. Pr.* 215.) An auctioneer. (*Bogart v. O'Regan*, 1 *E. D. Smith*, 590; *Hulse v. Young*, 16 *Johns.* 1; *Minturn v. Main*, 3 *Seld.* 220; affirming *Minturn v. Allen*, 3 *Sand.* 50.) The managing owner of a vessel. (*Ward v. Whitney*, 3 *Sand.* 399.) A contractor for benefit of third parties. (*Rowland v. Phalen*, 1 *Bosw.* 43.) The outgoing trustees of an association. (*Davis v. Garr*, 2 *Seld.* 124.) An agent for a foreign principal. (*Considerant v.*

Brisbane, 22 *N.Y.* 389; *Habicht v. Pemberton*, 4 *Sand.* 657.) The officer of a foreign bank. (*Myers v. Machado*, 6 *Duer*, 678.) Or of a foreign government. (*Peel v. Elliot*, 16 *How. Pr.* 483; *Repub. of Mex. v. Arrangois*, 11 *How. Pr.* 1.) The assignee of an insurance policy in trust. *St. John v. Am. Mut. L. Ins. Co.*, 2 *Duer*, 419.

127. So, also, a trustee for the benefit of creditors is a trustee of an express trust. (*Mellen v. Hamilton Fire Ins. Co.*, 5 *Duer*, 101; *Ryerss v. Farwell*, 9 *Barb.* 615; *Lewis v. Graham*, 4 *Abb. Pr.* 106; *Fletcher v. Derrickson*, 3 *Bosw.* 181.) Such trustee may sue individually as holder of a promissory note. (*Butterfield v. Macomber*, 22 *How. Pr.* 150; *Ogden v. Prentiss*, 33 *Barb.* 160.) Trustees for benefit of creditors must sue jointly. (*Brinkerhoff v. Wemple*, 1 *Wend.* 470.) If a debtor assigns his property to trustees to be by them sold, and the proceeds to be divided *pro rata* among the creditors, a creditor in an action for an enforcement of the trust must join all the creditors as defendants. (*McPherson v. Parker*, 30 *Cal.* 455.) The president or treasurer of an incorporate association is the trustee of an express trust. (*Tibbets v. Blood*, 21 *Barb.* 650.) Or the nominal proprietor of an individual bank. (*Burbank v. Beach*, 15 *Barb.* 326.) The People, in any case where bond is taken to them for the benefit of individuals, are trustees of an express trust. (*People v. Norton*, 5 *Seld.* 176; *Bos v. Seaman*, 2 *C. R.* 1; *People v. Laws*, 3 *Abb. Pr.* 450; *People v. Walker*, 21 *Barb.* 630.) For a public injury, in New York, the Attorney-General is the proper party to sue. *Korff v. Green*, 16 *How. Pr.* 140; *Roosevelt v. Draper*, 16 *How. Pr.* 137; 23 *N.Y.* 318; *People v. Mayor of N.Y.* 19 *How. Pr.* 155; *People v.*

Albany and Vt. R.R. Co., 19 *How. Pr.* 523; Female Assn. of N.Y. *v.* Beekman, 21 *Barb.* 565.

128. It has been held that the priest who appears to have charge of church property is the proper party plaintiff in all actions concerning it. (*Santillan v. Moses*, 1 *Cal.* 92.) This however depends entirely upon the fact of, in whom the title stands, and whether the society is incorporated and how incorporated. A patentee of land confirmed to the wrong person holds the land in trust for the real parties in interest. (*Salmon v. Symonds*, 30 *Cal.* 301; see, also, *Bludworth v. Lake*, 33 *Cal.* 255; and see the late case of *Wasley v. Foreman*, *Cal. Sup. Ct., Jul. T.*, 1869.) And the Court will compel a conveyance by the trustee to the real party in interest. (*Salmon v. Symonds*, 30 *Cal.* 301.) One trustee cannot sue another while he remains such, for a breach of trust. (*Trustees of Meth. Epis. Ch. in Pultney v. Stewart*, 27 *Barb.* 553.) The *cestui que trust* is the only proper person to maintain such an action against the trustee. (*Female Assn. of N.Y. v. Beekman*, 21 *Barb.* 565; *Griffin v. Ford*, 1 *Bosw.* 123.) In general a *cestui que trust* cannot sue his trustee at law. 1 *Holt. N.P.C.* 641; 2 *Moore*, 240; 8 *Taunt.* 263; see 1 *Chitt. Gen. Pr.* 6, 7, 8.

129 A *cestui que trust*, under a deed of family arrangement, settled his share. There were two trustees of the settlement, one of whom was also a trustee of the deed of arrangement. In a suit to administer the trusts of this deed, and make the trustees responsible for breach of trust, *held*, that as a trustee of the settlement was an accounting party to the suit, the *cestuis que trust* under the settlement should be made parties. (*Payne v.*

Parker, *Law Rep.*, 1 *Eq.*, 200.) In suit against executors of deceased trustee, the *cestui que trust* is the proper plaintiff, not a surviving trustee. (*Bartlett v Hatch*, 17 *Abb. Pr.* 461.) Where a mortgage is executed by the trustee upon the trust estate, the *cestui que trust* is a necessary party to a suit for foreclosure, and if the *cestui que trust* is a *femme covert*, her husband is also a necessary party. (*Mavrich v. Grier*, 3 *Nev.* 52.) A mere nominal trustee cannot sue in equity in his own name, but the *cestui que trust* must be joined. (*Malin v. Malin*, 2 *Johns.* 238; *Baker v. Devereaux*, 8 *Paige*, 513; *Fish v. Howland*, 1 *Paige*, 20; *Schenk v. Ellingwood*, 3 *Edw.* 175.) The trustee of an express trust is entitled to bring an action in his own name for the benefit of his *cestui que trust*. *Winters v. Rush*, 34 *Cal.* 136.

130. Where one is administrator of a county treasurer who collected moneys as tax collector, he is a trustee *de son tort*. (*People v. Houghtaling*, 7 *Cal.* 348; approved in *Gunter v. James*, 9 *Cal.* 658.) Trustees of religious societies cannot sue as such except by the corporate name or title of the society. (*Bundy v. Birdsell*, 29 *Barb.* 31.) Trustees *de facto*, though it be not duly incorporated, have possession of the house under color of right, and may sue a trespasser. (*Green v. Cady*, 9 *Wend.* 414.) A mere consignee of goods as agent for the consignors cannot maintain an action for injury to them during the voyage. (*Ogden v. Cuddington*, 2 *Smith*, 317; *Price v. Powell*, 3 *Comst.* 322; *Dows v. Cobb*, 12 *Barb.* 310.) *Prima facie*, a consignee is presumed owner till presumption is rebutted. (*Price v. Powell*, 3 *Comst.* 322; *Brower v. Brig* "Water Witch," 19 *How. Pr.* 241.) As to stoppage *in*

transitu and right to reclaim, see (*Harris v. Pratt*, 17 *N.Y.* 249.) But a mere ordinary merchandise broker, if he has advanced upon the goods sold or has guaranteed the sale, may sue in his own name. *White v. Chouteau*, 10 *Barb.* 202.

UNDERTAKINGS.

131. Suit may be brought on a bond given to an officer, state, or corporation, on the part of the real party in interest. (*Baker v. Bartol*, 7 *Cal.* 651; approved in *War-mouth v. Hatch*, 33 *Cal.* 127; *Lally v. Wise*, 28 *Cal.* 539; *Curiac v. Packard*, 29 *Cal.* 200; *Loomis v. Brown*, 16 *Barb.* 325; *Bowdoin v. Coleman*, 6 *Duer*, 162; 3 *Abb. Pr.* 341; *Kirk v. Young*, 2 *Abb. Pr.* 453.) So also on an injunction bond. (*Browner v. Davis*, 15 *Cal.* 11.) Suit may be brought by one of several obligees, alone. (*Prader v. Purkett*, 13 *Cal.* 588; affirmed *S. C.*, *Jan. T.*, 1860; see, also, *Lally v. Wise*, 28 *Cal.* 539.) Defendant prevailing in replevin may sue on plaintiffs undertakings. *Becker v. Anderson*, 39 *Barb.* 340.

UNITED STATES.

132. The United States of America can sue in that name in chancery, without putting forward any public officer who could be called on to give discovery on a cross-bill. *United States of America v. Wagner*, *Law Rep.* 2 *Ch.* 582.

WHEN ONE OR MORE MAY SUE OR DEFEND FOR ALL.

133. If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant. (*Cole v. Reynolds*, 18 *N.Y.* 76.)

And when the question is one of a common or general interest of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all. (*Cal. Pr. Act*, § 14; 1 *Van Santv.* 126; *N. Y. Code*, § 119; *Nash's Ohio Pl.* 13; *Laws of Iowa*, § 2,763; *Idaho*, § 14; *Arizona*, § 14.) The above section and the class of actions there provided for applies to writs in equity only, and hence has no reference to an action of ejectment. *Andrews v. Mok. Hill*, 7 *Cal.* 330; *Valentine v. Mahoney*, *Cal. Sup. Ct., Apl. T.*, 1869.

III. PARTIES DEFENDANT.

134. Any person may be made a defendant who has, or who claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the questions involved. (*Cal. Pr. Act*, § 13; 1 *Van Santv. Pl. Eq. Pr.* 74; *N.Y. Code*, § 118; 1 *Van Santv. Pl.* 119; *Nash's Ohio Pl.* § 36; *Laws of Iowa*, § 2,762; *Oregon*, § 40; *Idaho*, § 13; *Nevada*, § 13; *Arizona*, § 13.) All persons materially interested in the subject matter of the suit should be made parties, either plaintiffs or defendants. (*Burton v. Lies*, 21 *Cal.* 87; affirmed in *Carpentier v. Williamson*, 25 *Cal.* 161; *Wilson v. Castro*, 31 *Cal.* 420.) And for damages for breach of contract, only the parties to the contract should be joined as defendants. *Barber v. Cazalis*, 30 *Cal.* 92.) In New York, persons severally liable should not be joined in the same action as defendants. *Le Roy v. Shaw*, 2 *Duer*, 626; *Phalen v. Dingee*, 4 *E. D. Smith*, 379; *Spencer v. Wheelock*, 11 *N.Y. Leg. Obs.* 329.

ANNULLING A PATENT TO LAND.

135. The patentee is a necessary party defendant. His rights cannot be determined or impaired in any side suit between third parties. *Boggs v. Merced Mining Co.*, 14 *Cal.* 279; approved in *Yount v. Howell*, 14 *Cal.* 469; *Pioche v. Paul*, 22 *Id.* 111.

ASSESSORS.

136. In Massachusetts, assessors are jointly, as well as severally liable, for illegally assessing and collecting a tax. *Washington v. Eveleth*, 7 *Pick.* 106.

COVENANTS.

137. In a suit to enforce a covenant not to carry on a certain trade, the original covenantor is not a proper party if he has parted with all interest and is not in fault. (*Clements v. Welles*, *Law Rep.* 1 *Eq.* 200.) It is held in Massachusetts that heirs are jointly chargeable, as assigns on a covenant of their ancestor which runs with the land that descends to them. (*Morse v. Aldrich*, 1 *Met.* 544.) So, with guardians severally appointed for different heirs. *Donohoe v. Emery*, 9 *Met.* 63.

EJECTMENT.

138. In ejectment, the actual occupant should be made defendant, as judgment can be entered only against the party in possession at the commencement of the suit. (*Garner v. Marshall*, 9 *Cal.* 268; approved in *Burke v. Table Mt. Wat. Co.*, 12 *Cal.* 409; *Noe v. Card*, 14 *Cal.* 609; *Dutton v. Marchaner*, 21 *Cal.* 609; *Cal.*

derwood *v.* Braley, 28 *Cal.* 98; Hawkins *v.* Reichert, 28 *Cal.* 536; Klink *v.* Cohen, 13 *Id.* 624; Fogarty *v.* Sparks, 22 *Cal.* 148; also approved in 28 *Cal.* 536; Owen *v.* Fowler, 24 *Cal.* 192; affirmed in 28 *Cal.* 536; Lyle *v.* Rollins, 25 *Cal.* 440; Dunick *v.* Deringer, 32 *Id.* 488; Shaver *v.* McGraw, 12 *Wend.* 558; Sherwood *v.* Vanderburgh, 2 *Hill*, 303; Ellicott *v.* Mosier, 7 *N.Y.* 201; 11 *Barb.* 574; 3 *Seld.* 201.) A mere party in charge, for others, is not an occupant. (Hawkins *v.* Reichert, 28 *Cal.* 534; People *v.* Ambrecht, 11 *Abb. Pr.* 97.) A railroad company who have simply laid rails on a public highway are not occupants. Redfield *v.* Utica and Syracuse R.R. Co., 25 *Barb.* 54.

139. In ejectment against mining claims, it is not necessary to include as defendants those holding other undivided interests. (Waring *v.* Crow, 11 *Cal.* 366.) A landlord cannot be joined with the tenant in possession as defendant. (Palen *v.* Reynolds, 22 *How. Pr.* 353.) But a landlord may come in and defend in an action in ejectment, where summons is served on a tenant, by a proper showing, even after a default is taken. The statute should in such cases be construed so as to dispose of actions of this character as nearly on their merits as possible, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided. (Roland *v.* Kreyenhagen, 18 *Cal.* 455; see, also, Ried *v.* Calderwood, 22 *Cal.* 465; Barrett *v.* Graham, 19 *Cal.* 632; affirmed in Bailey *v.* Taaffe, 29 *Cal.* 424.) A landlord may defend in the name of the tenant, but not in his own name. Dimick *v.* Deringer, 32 *Cal.* 488.

140. Persons renting different apartments in the same house may be joined as defendants in an action of

ejectment. (Pearce *v.* Colden, 8 *Barb.* 522.) When premises are unoccupied, parties claiming title accompanied by acts of ownership may be made defendants. (Garner *v.* Marshall, 9 *Cal.* 268; Taylor *v.* Crane, 15 *How. Pr.* 358.) And any number may be made defendants, subject to their right to answer separately. Winans *v.* Christy, 4 *Cal.* 70; approved in Ritchie *v.* Dorland, 6 *Cal.* 33; Ellis *v.* Jeans, 7 *Id.* 417; Curtis *v.* Sutter, 15 *Cal.* 264; same parties, 26 *Id.* 276; Leese *v.* Clark, 28 *Id.* 35; Fosgate *v.* Herkimer Manfg. and Hydraulic Co., 12 *Barb.* 352.

EXECUTORS AND ADMINISTRATORS DEFENDANTS.

141. The general right to sue an administrator was taken away by statute, except in case of presentation and rejection of the account. (Ellison *v.* Halleck, 6 *Cal.* 393.) And no action lies where claim was not presented. (Hentsch *v.* Porter, 10 *Cal.* 559; 27 *Id.* 354.) If an executor has come into the possession of the trust fund or its substitute, so that the same can be identified, he can be held to account and charged as trustee, upon the same terms as his testator held the trust, and the relation of trustee and *cestui que trust* is added to that of executor. Lathrop *v.* Bampton, 31 *Cal.* 17.

142. In suit for specific performance of testator's contract for sale of lands, the executor of deceased should join as plaintiff. (Adams *v.* Green, 34 *Barb.* 176.) In an action for specific performance against heirs on their ancestor's contract, and damages are demanded in the alternative, the executors or administrators should be made parties, or no judgment can be taken for such damages. (Massie's Heirs *v.* Donaldson,

8 *Ohio R.* 377.) In Nevada, a joint action cannot be maintained against survivor and administrator of deceased maker of a promissory note. *Maples v. Geller*, 1 *Nevada*, 233.

143. It is a general rule of law that no action will lie against an executor or administrator to which his testator or intestate was not liable. (2 *Williams on Executors*, p. 1,478; *Eustace v. Jahns*, *Cal. Sup. Ct., Jul. T.*, 1869.) The estate represented by a person upon whom the duty of keeping the premises in repair is cast, is no more liable for his neglect of that personal duty than it would be for a fine which might be imposed upon him by a criminal court for an assault and battery committed by him while in possession of such estate. *Craton v. Wensiger*, 2 *Texas*, 202; *Able v. Chandler*, 12 *Id.* 92; *Eustace v. Jahns*, *Cal. Sup. Ct., Jul. T.*, 1869.

FORECLOSURE OF MORTGAGES.

144. All persons materially interested should be joined as defendants. (*Ord v. McKee*, 5 *Cal.* 515; *Laning v. Brady*, 10 *Cal.* 265; *Montgomery v. Tutt*, 11 *Cal.* 307; *Tyler v. Yreka Water Co.*, 14 *Id.* 212; *De Leon v. Higuerra*, 15 *Id.* 483; *Goodenow v. Ewer*, 16 *Cal.* 461; *McDermott v. Burke*, *Id.* 580; *Boggs v. Hargrave*, *Id.* 559; *Kohner v. Ashenauer*, 17 *Id.* 578; *Burton v. Lies*, 21 *Id.* 87; *Horn v. Jones*, 28 *Id.* 194; *Brainard v. Cooper*, 6 *Seld.* 356; *Peck v. Mallams*, *Id.* 509; *Welsh v. Rutgers Fire Ins. Co.*, 13 *Abb. Pr.* 33; *Case v. Price*, 17 *How. Pr.* 348; 9 *Abb. Pr.* 111.) It seems that in New York the wife of a mortgagor or of subsequent grantee of equity of redemption must be joined. (*Denton v. Nanny*, 8 *Barb.* 618; *Dexter v.*

Arnold, 1 *Sumn.* 109; Gordon v. Lewis, 2 *Sumn.* 143; Wheeler v. Morris, 2 *Bosw.* 524; Vartie v. Underwood, 18 *Barb.* 561; Mills v. Van Voorhis, 23 *Barb.* 125; Blydenburg v. Northrop, 13 *How. Pr.* 289; Brownson v. Gifford, 8 *How. Pr.* 389; Pinkney v. Wallace, 1 *Abb. Pr.* 82; Lewis v. Smith, 11 *Barb.* 152.) So, the mortgagee may be joined with mortgagor as defendants. (Marvin v. Dennison, 1 *Blatch. S. Ct.* 159.) In a foreclosure suit, where defendant dies after commencement of suit, the administrator becomes a necessary party in a petition for decree of sale of mortgaged premises. Belloc v. Rogers, 9 *Cal.* 123; see Fallon v. Butler, 21 *Cal.* 24.

145. The owner of the equity of redemption is a necessary party to a foreclosure suit. (Farmers L. and T. Co. v. Dickson, 9 *Abb. Pr.* 64; Hall v. Nelson, 23 *Barb.* 88; 14 *How. Pr.* 32; Reed v. Marble, 10 *Paige*, 409; Dexter v. Arnold, 1 *Sumn.* 109; Gordon v. Lewis, 2 *Sumn.* 143; Griswold v. Fowler, 6 *Abb. Pr.* 120; N. Y. Life Ins. and Trust Co. v. Bailey, 3 *Edw.* 417; Crooke v. O'Higgins, 14 *How. Pr.* 154; see Bank of Orleans v. Flagg, 3 *Barb. Ch. R.* 316; Case v. Price, 9 *Abb. Pr.* 113.) Grantees of mortgaged property are necessary parties defendant, with mortgagor. (Skinner v. Buck, 29 *Cal.* 253; Heyman v. Lowell, 23 *Cal.* 106; Brooks v. Tichnor, *Oct. T.* 1864.) But where the payment of the mortgage was assumed by subsequent grantee as between him and the mortgagor, though such grantee was a necessary party, the mortgagor was not. Drury v. Clark, 16 *How. Pr.* 424; Van Nest v. Latson, 19 *Barb.* 604; Stebbins v. Hall, 39 *Barb.* 524.

146. In general all incumbrancers must be made

parties to a bill of foreclosure. (*Fineey v. Bank of United States*, 11 *Wheat. S. Ct.* 304; *Matcarm v. Smith*, 6 *McLean, S. Ct.* 416; *Ensworth v. Lambert*, 4 *Johns. Ch. R.* 605; *Haines v. Beach*, 3 *Id.* 461.) But an incumbrancer who becomes such pending suit is not entitled to redeem, and therefore need not be made a party. (*Cook v. Mancius*, 5 *Johns. Ch. R.* 89; *Loomis v. Stuyvesant*, 10 *Paige*, 490; *Peoples Bank v. Hamilton Manf. Co.*, 10 *Paige*, 481; see *Bishop of Winchester v. Paine*, 11 *Ves.* 197.) In a foreclosure of mortgage given by trustees the *cestuis que trust* are necessary parties. (*Piatt v. Oliver*, 2 *McLean, S. Ct.* 267.) When an action is brought to foreclose a mortgage securing the payment of a promissory note, the maker and indorser of the note may be joined as defendants. (*Eastman v. Turman*, 24 *Cal.* 382.) A writ of entry to foreclose a mortgage may be maintained against tenant in possession. *Fales v. Gibbs*, 5 *Mas. C. Ct.* 462.

147. Suits for the foreclosure of a mechanic's lien are in many respects analogous to those in ordinary foreclosure. All parties necessary to enable the Court to do complete justice should be joined. See *Sullivan v. Decker*, 1 *E. D. Smith*, 699; *Lowber v. Childs*, 2 *E. D. Smith*, 577; *Foster v. Skidmore*, 1 *Id.* 719; *Kaylor v. O'Connor*, *Id.* 672.

FRAUD.

148. In an action for relief from fraud in obtaining a judgment, the attorney at law charged with being a party to the fraud should be joined with the client. (*Crane v. Hirschfelder*, 17 *Cal.* 467.) So, partners may be jointly sued for fraudulently recommending an in-

solvent person as worthy of credit. (*Patten v. Gurney*, 17 *Mass.* 182.) Or for deceit in a sale, if both knowingly make false representation, though only one was interested in the expected fruits of the fraud. (*Stites v. White*, 11 *Met.* 356.) So, in an action to set aside conveyance as made without consideration and in fraud of creditors, the fraudulent grantor is a necessary party defendant. *Gaylords v. Kelshaw*, 1 *Wall. U. S.* 81.

HUSBAND AND WIFE.

149. If a husband and wife be sued together, the wife may defend for her own right. (*Cal. Pr. Act*, § 8, *Nash's Ohio P.* p. 15; *Laws of Iowa*, § 2,774; *Laws of Idaho*, § 8; *Code of Arizona*, § 8; *Nevada* § 8.) In this State, the wife may appear in and defend an action separately from her husband. (*Alderson v. Bell*, 9 *Cal.* 315; approved in *Leonard v. Townsend*, 26 *Cal.* 445.) Where the defense of the wife is a special one, she can defend for her own right as well when sued jointly as if the trial was separate. (*Deuprez v. Deuprez*, 5 *Cal.* 387.) To enable her to defend in her own right, she must possess as defendant the rights of a *femme sole*. *Alderson v. Bell*, 9 *Cal.* 315; *Leonard v. Townsend*, 26 *Id.* 445.

150. In an action pertaining to her property as sole trader under the Act of 1852, the husband need not be joined. (*Guttman v. Scannell*, 7 *Cal.* 455.) For other authorities, see (*Dunderdale v. Grymes*, 16 *How. Pr.* 195; *Rouillier v. Werniki*, 3 *E. D. Smith*, 310; *Avogadro v. Ball*, *Id.* 385; *Freeman v. Orser*, 5 *Duer*, 477.) And she must be sued alone. (*McKune v. McGarvey*, 6 *Cal.* 497; approved in *Guttman v. Scan-*

nell, 7 *Cal.* 455; and Camden *v.* Mullen, 29 *Cal.* 564.) Where a wife carries on business in San Francisco in her own name, and her husband resides out of the State, a loan is effected by the wife to purchase land therewith, and the husband subsequently joins his wife and exercises acts of ownership over the land by selling a part thereof, etc., a personal judgment cannot be taken against the wife for the money loaned. *Maclay v. Love*, 25 *Cal.* 367; *Smith v. Greer*, 31 *Cal.* 477; *Brown v. Orr*, 29 *Cal.* 120; cited in *Althof v. Conheim*, *Cal. Sup. Ct., Jul. T.*, 1869.

151. A married woman is not bound by the subsequent promise of her husband to pay in gold coin, as she is incapable in law of contracting a personal obligation or binding her estate, except by an instrument in writing, acknowledged and certified as required by the statute. (*Smith v. Greer*, 31 *Cal.* 476; *Maclay v. Love*, 25 *Id.* 367; *Rowe v. Kohl*, 4 *Id.* 285; cited in *Belloc v. Davis*, *Cal. Sup. Ct., Jul. T.*, 1869.) So, in slander by husband, he must *be sued alone*. (*Malone v. Stillwell*, 15 *Abb. Pr.* 421.) But in slander by wife, *both husband and wife* must be joined. *Id.*

152. The husband is properly joined with the wife in an action upon obligation contracted by the wife previous to marriage. (*Keller v. Hicks*, 22 *Cal.* 457.) In a suit to foreclose a mortgage, and set aside a fraudulent conveyance of property by the husband to the wife, the wife was properly joined with the husband as defendant. (*Kohner v. Ashenauer*, 17 *Cal.* 578.) And in a foreclosure of the husband's mortgage for the purchase money of wife's separate estate, both must be joined. (*Mills v. Van Voorhies*, 20 *N.Y.* 412; 10 *Abb.*

Pr. 152; *Rusher v. Morris*, 9 *How. Pr.* 266.) So also, where the wife executes a mortgage with her husband. (*Anthony v. Nye*, 30 *Cal.* 401; *Conde v. Shepard*, 4 *How. Pr.* 75; *Conde v. Nelson*, 2 *Code R.* 58.) So, in partition suits, the wife must be joined with her husband as defendant. (*De Uprey v. De Uprey*, 27 *Cal.* 329; *Ripple v. Gilborn*, 8 *How. Pr.* 460; *Tanner v. Niles*, 1 *Barb.* 563.) In forcible entry and detainer also, the husband is properly joined in the action. (See *Howard v. Valentine*, 20 *Cal.* 282.) So also, where the homestead is involved, the wife must be joined as defendant in certain cases. *Sargent v. Wilson*, 5 *Cal.* 504; approved in *Moss v. Warner*, 10 *Cal.* 297; *Revalk v. Kræmer*, 8 *Cal.* 66; *Marks v. Marsh*, 9 *Id.* 96; *Horn v. Volcano Wat. Co.*, 13 *Id.* 70.

INFANT.

153. When the infant is defendant, a guardian will be appointed upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant. (*Cal. Pr. Act*, § 10, Subd. 2; *N.Y. Code*, § 116.) The defense of an infant must be by a guardian for the suit, who may be appointed by the Court, a judge thereof, or a probate judge. The appointment cannot be made until after the service of the summons. *Laws of Oregon*, § 32.

INFRINGEMENT OF PATENT.

154. In selling an article which infringes upon a patent, the agent may be joined with the manufacturer

as a party defendant in an action against them as trespassers. *Buck v. Cobb*, 9 *Law Rep.* 545; see *Boyce v. Dorr*, 3 *McLean*, 582.

INJUNCTION.

155. In action to enjoin the issuance of bonds by fund commissioners, it is necessary that some of the parties to whom bonds are to be issued should be parties defendant. (*Hutchinson v. Burr*, 12 *Cal.* 103; affirmed in *Patterson v. Yuba Co.*, *Id.* 105; see *Boggs v. Merced Min. Co.*, 14 *Id.* 279.) In a bill of peace to restrain vexatious litigation, although some of the parties be mere accommodation grantees, they have a right to be heard at law in their own defense. *Knowles v. Inches*, 12 *Cal.* 212.

INJURIES CAUSED BY NEGLIGENCE.

156. Where damage was done and property of plaintiff destroyed by the freshet caused by the breaking of a dam built by contractors; the employers exercising no supervision, giving no directions, furnishing no materials, nor having accepted the work; *Held*, that the contractors alone were liable. (*Boswell v. Laird*, 8 *Cal.* 469.) As to liability for injuries caused by defective construction after acceptance, see (*Boswell v. Laird*, 8 *Cal.* 469; affirmed in *Fanjoy v. Seales*, 29 *Cal.* 249.) Carriers, for loss of goods, may be sued jointly or severally. (*McIntosh v. Ensign*, 28 *N.Y.* 169.) And they are also entitled to sue severally. *Merrick v. Gordon*, 20 *N.Y.* 93.

LEGACY.

157. Purchasers of land, in unequal portions, charged

with the payment of a legacy, must be joined in an action for the legacy. *Swasey v. Little*, 7 *Pick.* 296.

PARTNERS.

158. Partners may be sued by their common name, whether it comprises the names of the persons associated or not. (*Cal. Pr. Act*, § 656; *Welch v. Kirkpatrick*, 30 *Cal.* 202; *Gilman v. Cosgrove*, 22 *Cal.* 356.) But a party can only be bound on a note executed in a firm name, who is actually a member of the firm executing the same, or has held himself out as a member so as to give the firm credit on his responsibility. So it would seem, dormant partners not disclosed need not be joined as defendants. (*North v. Bloss*, 30 *N.Y.* 374; *Wood v. O'Kelley*, 8 *Cush.* 406; *Lord v. Baldwin*, 6 *Pick.* 352; see, also, *N.Y. Dry Dock Co. v. Treadwell*, 19 *Wend.* 525; *Clarkson v. Carter*, 3 *Cow.* 84; *Clark v. Miller*, 4 *Id.* 628; *Mitchell v. Doll*, 2 *Har. & Gill*, 159; *Hurlbut v. Post*, 1 *Bosw.* 28.) All partners are liable for fraudulent representations of one, made in the course of the partnership business. (*Griswold v. Havens*, 25 *N.Y.* 595.) So, a partner is liable to third persons for injuries occasioned by negligence, if committed in the course of the partnership business. (*Cotter v. Bettner*, 1 *Bosw.* 490.) In suit to take an account and dissolve a mining partnership, all those owning interests are necessary parties defendant. *Settembre v. Putnam*, 30 *Cal.* 490; approved in *McConnell v. Denver*, 35 *Cal.* 365; and cited as authority in *Sandfoss v. Jones*, 35 *Cal.* 481.

PRINCIPAL AND AGENT.

159. A principal, though himself innocent, is liable

for fraud or misconduct of the agent acting within the scope of his authority. (*Dwinelle v. Henriquez*, 1 *Cal.* 392; *Adams v. Cole*, 1 *Daly*, 147; *Hunter v. Huds. Riv. Iron and Machine Co.*, 20 *Barb.* 493; *Thomas v. Winchester*, 2 *Seld.* 397.) But not in matters beyond that scope. (*N.Y. Life Ins. and Trust Co. v. Beebe*, 3 *Seld.* 364; see, also, *Mechanics' Bank v. N.Y. and N.H. R.R. Co.*, 3 *Kern.* 599; 4 *Duer*, 570.) And where the principal is known, he alone is liable. (*Conro v. Fort Henry Iron Co.*, 12 *Barb.* 27.) But an agent may render himself personally liable by not disclosing the name of his principal. (*Nason v. Cockroft*, 3 *Duer*, 366; *Cabre v. Sturges*, 1 *Hilt.* 160; *Blakeman v. Mackay*, *Id.* 266.) If on the face of an instrument not under seal, executed by an agent with competent authority, by signing his own name simply, it appears that the agent executed it in behalf of the principal, the principal and not the agent is bound. (*Haskell v. Cornish*, 13 *Cal.* 45; affirmed in *Shaver v. Ocean Min. Co.*, 21 *Cal.* 45; *Hall v. Crandall*, 29 *Id.* 571; *Love v. S. N. L. W. and M. Co.*, 32 *Cal.* 654.) Where a party makes a purchase from an innocent agent, who afterwards parts with the money of his principal, and the purchase avails the purchaser nothing, no legal right of complaint will lie against the agent. (*Engels v. Heatly*, 5 *Cal.* 136.) The principal and agent are jointly liable for an injury caused by negligence of the agent. *Phelps v. Wait*, 30 *N.Y.* 78.

TENANTS IN COMMON.

160. Where defendants are charged in trespass for holding real estate, as joint tenants, or tenants in common, all must be joined. *Sumner v. Tileston*, 4 *Pick.* 308.

TRESPASS.

161. Joint trespassers may be sued jointly or severally. (Creed *v.* Hartman, 29 *N.Y.* 591; Kasson *v.* The People, 44 *Barb.* 347.) That they may be sued jointly, see (King *v.* Orser, 4 *Duer.* 431; Waterbury *v.* Westervelt, 5 *Seld.* 598; Herring *v.* Hoppock, 3 *Duer.* 20; Marsh *v.* Backus, 16 *Barb.* 483.) A justice of the peace who issues an execution commanding the arrest of the judgment debtor, and the attorney who procures the execution to be issued in a case in which both know that the law prohibits an arrest in such action, are jointly liable to the debtor in trespass. Sullivan *v.* Jones, 2 *Gray*, 570.

TRUSTEES.

162. In an action to carry out a trust deed, or against trustee, for breach of trust, all the *cestuis que trust* are necessary parties. (Colgrove *v.* Tallmadge, 6 *Bosw.* 289; Bishop *v.* Houghton, 1 *E. D. Smith*, 566; Bank of Brit. N. A. *v.* Suydam, 6 *How. Pr.* 379; Johnson *v.* Snyder, 8 *How. Pr.* 498.) But not in an action to set aside a trust deed. (Russell *v.* Lasher, 4 *Barb.* 232; Wheeler *v.* Wheedon, 9 *How. Pr.* 293; Scudder *v.* Voorhis, 5 *Sandf.* 271; see, also, Wallace *v.* Eaton, 5 *How. Pr.* 99.) A party not a trustee may be joined or not, at the option of the plaintiff. (Bateman *v.* Margerison, 6 *Hare*, 499.) In an action by one of several *cestuis que trust* to declare and enforce an implied trust, all who claim to be entitled to a portion of the trust estate are proper parties defendant. (Jenkins *v.* Frink, 30 *Cal.* 586; West *v.* Randall, 2 *Mas.* 181; Armstrong *v.* Lear, 8 *Pet.* 52; Gen. Mut. Ins. Co. *v.*

Benson, 5 *Duer*, 168.) But when such share is ascertained, each claimant may sue alone. (*Id.*; *Smith v. Snow*, 3 *Madd.* 10.) Or for breach of trust. *Perry v. Knott*, 5 *Beav.* 293.

163. Persons holding funds and who have always dealt with them as if they were trust funds, are liable for losses occasioned by improper investments, though they did not in fact know who the *cestuis que trust* were. (*Ex parte Norris*, *Law Rep.* 4 *Ch.* 280.) So, where A. was indebted to plaintiff, and conveyed his property to B., to be disposed of for his benefit, and had drawn an order in favor of plaintiff on B., who had accepted it, and B. subsequently conveyed a portion of the property to A., without consideration; *Held*, that A. was a proper and necessary party to the action. *Lucas v. Payne*, 7 *Cal.* 92; *Shaver v. Brainard*, 29 *Barb.* 25.

DIFFERENT PARTIES IN ONE ACTION.

164. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same and separate instruments, may all or any of them be included in the same action, at the option of the plaintiff. (*Cal. Pr. Act*, § 15; *N.Y. Code*, § 120; *Iowa*, § 2,764; *Oregon*, § 36; *Idaho*, § 15; *Arizona, Id.*) This section applies only to written obligations. *Spencer v. Wheelock*, 11 *Leg. Obs.* 329; *Tibbits v. Percy*, 24 *Barb.* 39.

165. It applies to bonds, as well as bills of exchange and promissory notes. (*People v. Hartley*, 21 *Cal.* 585; *White v. Fratt*, 13 *Cal.* 521; *Brainard v. Jones*, 11 *How. Pr.* 569.) As to when the bondholders of bonds

issued by a county should be made parties defendants in suit against the county, see (*Hutchinson v. Burr*, 12 *Cal.* 103.) In Oregon, the sureties on an executor's bond cannot be sued until after default in the Probate Court. *Hamlin v. Kenney*, *Laws of Oregon*, 1866. p. 55.

166. It applies in cases of joint and several contracts. (*Humphreys v. Crane*, 5 *Cal.* 173; *Stearns v. Aguirre*, 6 *Cal.* 176.) And persons jointly and severally liable may be sued together or separately, at the option of the plaintiff. (*Enys v. Donnithorne*, 2 *Burr.* 1,190; *Eccleston v. Clipsham*, 1 *Saund.* 153; *Alfred v. Watkins*, 1 *C. R.* 343; *Kelsey v. Bradbury*, 21 *Barb.* 531; *Parker v. Jackson*, 16 *Barb.* 33; *Brainard v. Jones*, 11 *How. Pr.* 569; *De Ridder v. Schermerhorn*, 10 *Barb.* 638; *Snow v. Howard*, 25 *Barb.* 55.) To create a several liability, express words are necessary. *Brady v. Reynolds*, 13 *Cal.* 31.

167. In New York, it seems the plaintiff may sue one or all of the obligors of a joint and several bond; but in strictness of law, he cannot sue an intermediate number. (*Leroy v. Shaw*, 2 *Duer*, 626; *Minor v. Mechanics' Bk. of Alexandria*, 1 *Pet. S. Ct.* 46; *Annis v. Smith*, 16 *Id.* 303; *Brainard v. Jones*, 11 *How. Pr.* 569; *Loomis v. Brown*, 16 *Barb.* 325; *Phalen v. Dingee*, 4 *E. D. Smith*, 379; *Allen v. Fosgate*, 11 *How. Pr.* 218.) The practice is however different in California, where one or all or any intermediate number may be made defendants, at the option of the plaintiff. (*Lewis v. Clarkin*, 18 *Cal.* 400; see, also, *People v. Love*, 25 *Cal.* 520.) So, also, in cases of a promissory note, and mortgage to secure the same. (*Eastman v. Turman*, 24 *Cal.* 379.) Although the several parties to a bill or note

may be sued in one action, yet their being so sued does not make them jointly liable. (*Alfred v. Watkins*, 1 *Code R. (N.S.)* 343.) Or joint debtors. *Kelsey v. Bradbury*, 21 *Barb.* 531; *Farmers' Bank v. Blair*, 44 *Barb.* 642.

168. The common law rule, that where defendants are sued on a joint contract, recovery must be had against all or none, is modified by the Practice Act. (*People v. Frisbie*, 18 *Cal.* 402.) So, where joint debtors reside in different states, they may be sued separately. *Brown v. Birdsall*, 29 *Barb.* 549.

169. It seems that different parties, liable for the same sum, but under different contracts, cannot be joined in the same action. (*Allen v. Fosgate*, 11 *How. Pr.* 218; *Glencoe Mut. Ins. Co. v. Harrold*, 20 *Barb.* 298; *De Ridder v. Schermerhorn*, 10 *Barb.* 638; see, also, *Brown v. Curtis*, 2 *Comst.* 225; *Barker v. Cassidy*, 16 *Barb.* 177; *White v. Low*, 7 *Barb.* 204.) So held in New York, as to a guaranty written under a promissory note. (*Brewster v. Silence*, 4 *Seld.* 207; affirming *S.C.* 11 *Barb.* 144; *Kelsey v. Bradbury*, 21 *Barb.* 540; *Alfred v. Watkins*, 1 *Code R. (N.S.)* 343; *Draper v. Snow*, 20 *N.Y.* 331; *Church v. Brown*, 29 *Barb.* 389.) And that the guarantor cannot be sued in the same action with the maker. (*Allen v. Fosgate*, 11 *How. Pr.* 218.) It was there held also, that the liability of a purchaser and his guarantor is several. (*Leroy v. Shaw*, 2 *Duer*, 626; *Spencer v. Wheelock*, 11 *L. O.* 329.) So, also, of a lessee and his surety. *Phalen v. Dinger*, 4 *E. D. Smith*, 379.

PART SECOND.

ANALYSIS OF PLEADINGS.

CHAPTER I.

OF PLEADINGS IN GENERAL.

1. A pleading on the part of the plaintiff, is a statement, in legal form, of his cause of action against the defendant; and on the part of the defendant, it is a denial, avoidance, or admission of the plaintiff's statement. In other words, by pleadings we understand that A. makes a charge in writing, and in a competent court of justice against B. for some wrong suffered by him, and that B. denies the charge in writing or avoids the effect of it by making a different statement, or admits the facts alleged. For further definition, see *Gould's Pl.* 1; 1 *Van Santv.* 79.

2. The object of the pleadings on the part of the plaintiff is to appeal to a court of justice for relief against the defendant for wrongs suffered by him, and on the part of the defendant to avoid any relief being granted to the plaintiff. The most simple manner in which the statements can be made consistent with legal form, is the best pleading. By legal form is meant that the claim for injuries, as suffered on the one part, must be for injuries which are unlawful, or which the law recog-

nizes as wrong, and that the defense set up on the other part must be some legal excuse for the injury inflicted. See *Gould's Pleadings*, § 8.

3. Under our statutes (*Cal. Pr. Act*, § 1), and under the statute of other states which have adopted a code of procedure similar to ours, only one form of action exists. By "*form*" is evidently meant the manner of stating the cause of action. The object of this innovation on the common law was to establish a uniform system, complete in itself. (*Humiston v. Smith*, 21 *Cal.* 134.) But it cannot be claimed that by this sweeping provision *more* than the *forms* of actions are changed; the substance remains the same. The old common law rules of pleading, like the simple rules of arithmetic, are unchanged. *Miller v. Van Tassel*, 24 *Cal.* 463; *Sampson v. Shaffer*, 3 *Cal.* 204; *People ex rel. Crane v. Rider*, 2 *Kern.* 433; *Dunning v. Thomas*, 11 *How. Pr.* 281; *Walker v. Hewitt*, *Id.* 395; see *Lafleur v. Douglass*, *Wash. Terr.* 215.

STATUTORY DEFINITION.

4. The statute (*Cal. Pr. Act*, § 36) prescribes that "the pleadings are the formal allegations by the parties of their respective claims and defenses for the judgment of the Court." This definition being purely statutory, is not intended to supersede the more general definition of pleadings given by the common law. And yet it must not be forgotten that as there is but one *form* of civil action in this State, the same rules govern in proceedings both at law and in equity. It was held by the Supreme Court of California in the case of *Bowen v. Aubrey*, (22 *Cal.* 569), that "under the Code of Practice,

we have but one system of rules respecting pleadings, which governs all cases both at law and in equity. These rules are clearly laid down in the Practice Act; and although in construing that Act, we resort to former adjudications, and the old and well established principles of pleading at common law, yet the former distinctions which existed between common law and equity pleadings no longer exist." See, also, *Sampson v. Schæffer*, 3 *Cal.* 196; *Cordier v. Schloss*, 12 *Id.* 143; *Payne v. Treadwell*, 16 *Cal.* 243.

5. In the New York Code of Procedure, § 69, the distinction between actions at law and suits in equity is expressly abolished. In Ohio, Iowa, Nevada, Oregon, Idaho, Arizona Territory, and most of the states and territories of the Union, as well as New York and California, "the distinction in the modes of obtaining relief which formerly characterized the proceedings in courts of law and in equity are abolished," but only as to the *forms of actions*, and not as to the principles which govern them. 1 *Whitt. Pr.* 553; see, also, 1 *Van Santv. Pl.* 39; *Nash's O. P.* 2; 2 *Till. & Sh.* 1; *Swan's Pl.* 21; *Stat. of Iowa*, § 2,608; *Traphagen v. Traphagen*, 40 *Barb.* 537; *McBurney v. Wellman*, 42 *Barb.* 390; *Dunnell v. Keteltas*, 16 *Abb. Pr.* 205; *Van Renssalaer v. Reed*, 26 *N.Y.* 558; *Sherwood v. Barton*, 36 *Barb.* 284; *Denman v. Prince*, 40 *Barb.* 213; *Schroeppel v. Hopper*, 40 *Barb.* 425; *Weatherly v. Wood*, 29 *How. Pr.* 404.

6. In adjudications under the New York Code (Howard *v. Tiffany*, 3 *Sandf.* 695; 1 *Van Santv. Pl.* 41) it is held that although the forms of actions at law

and in equity are abolished, yet that even in the pleadings, or the manner of stating the facts which constitute plaintiff's cause of action, there is still a broad distinction between cases where legal instead of equitable relief is asked. Following in the same track, the Supreme Court of California has held, "the distinction between law and equity is as marked as ever, though there is no difference in the form of a bill in chancery and a common law declaration under our system." 1 *Whitt. Pr.* 557; 2 *Till. & Shear.* 2; *Rowe v. Chandler*, 1 *Cal.* 167; *Dewitt v. Hayes*, 2 *Id.* 463; *Lubert v. Chauviteau*, 3 *Cal.* 467; *Smith v. Rowe*, 4 *Id.* 6; *Wiggins v. McDonald*, 18 *Id.* 127; *Linden v. Hepburn*, 2 *Sand.* 668; *Howard v. Tiffany*, *Id.* 665.

7. For discussions on this subject see *Reubens v. Joel*, 3 *Ker.* 493; *Scovill v. Griffith*, 2 *Ker.* 515; *Trull v. Granger*, 4 *Seld.* 119; *Ten Eyck v. Haughtalling*, 12 *How. Pr.* 529; *Phillips v. Gorham*, 17 *N.Y.* 270; *Voorhis v. Childs' Ex.*, *Id.* 354; *Cole v. Reynolds*, 18 *N.Y.* 74; *Goulet v. Asseler*, 22 *N.Y.* 228; *N.Y. Ice Co. v. N.W. Ins. Co.*, 23 *N.Y.* 357; 12 *Abb. Pr.* 414; *Seneca Road Co. v. Auburn and Rochester R.R. Co.*, 5 *Hill*, 170; *Burdick v. Worrall*, 4 *Barb.* 596; 9 *Burg.* 678; 11 *East*, 62; 2 *Chitt. Pl.* 12; *Grah. Pr.* 202; *Cornes v. Harris*, 1 *N.Y.* (1 *Comst.*) 223; *Clark v. Crandall*, 27 *Barb.* 73; *Eno v. Woodworth*, 4 *Comst.* 249; *Bishop v. Houghton*, 1 *E. D. Smith*, 566; *Gen. Mut. Ins. Co. v. Benson*, 5 *Duer*, 168; *Arndt v. Williams*, 16 *How. Pr.* 244; *Grant v. Quick*, 5 *Sand.* 616; *Gardner v. Oliver Lee's Bank*, 11 *Barb.* 558; *Hinman v. Judson*, 13 *Barb.* 629; *Merritt v. Carpenter*, 30 *Barb.* 61; *Hartt v. Harvey*, 19 *How. Pr.* 245; 10 *Abb. Pr.* 321; *N.Y. Ice Co. v. N.W. Ins. Co.*, 31 *Barb.* 72; 20 *How. Pr.* 424; 10

Abb. Pr. 34; *Auburn Cit. Bank v. Leonard*, 20 *How. Pr.* 193; *People v. Bennett*, 5 *Abb. Pr.* 384; *White v. Joy*, 13 *N.Y.* (3 *Kern.*) 90; *Rundle v. Allison*, 34 *N.Y.* 180; *Lynch v. Rome Gas Light Co.*, 42 *Barb.* 591; *Peck v. Newton*, 46 *Barb.* 173; *Grinnell v. Buchanan*, 1 *Daly*, 538; *McMaster v. Booth*, 4 *How. Pr.* 427; *Hill v. McCarthy*, 3 *N.Y. Code R.* 49; *Barnes v. Willett*, 19 *How. Pr.* 564; 11 *Abb. Pr.* 225; *Claig v. Goodwin*, 9 *Barb.* 657; *LeRoy v. Marshall*, 8 *How. Pr.* 373; *Giles v. Lyon*, 4 *Comst.* 600; 1 *N.Y. Code R.* 257; *Dobson v. Pearce*, 2 *Kern.* 156; 1 *Duer.* 10; *N.Y. Leg. Obs.* 170; *Crary v. Goodman*, 2 *Kern.* 266; *Marquat v. Marquat*, *Id.* 336; 7 *How. Pr.* 417; *Allen v. Smillie*, 1 *Abb. Pr.* 357; *Eno v. Woodworth*, 4 *Comst.* 253; *Blanchard v. Strait*, 8 *How. Pr.* 86; *Woods v. Anthony*, 9 *How. Pr.* 78.

8. Legal and equitable relief may be asked for in the same action, but the wrongs suffered must be those arising out of or from one and the same transaction, and which would be consistent with the relief asked. (*Gen. Mut. Ins. Co. v. Benson*, 5 *Duer*, 168; *Williams v. Hayes*, 5 *How. Pr.* 470; *Milliken v. Crary*, *Id.* 272; *People v. Ryder*, 12 *N.Y.* 433; *Getty v. Hudson River R. R. Co.*, 6 *How. Pr.* 269; *Gooding v. McAlister*, 9 *Id.* 123; *Spier v. Robinson*, *Id.* 325; *Mott v. Dunn*, 10 *Id.* 225; *Jeroliman v. Cohen*, 1 *Duer*, 629; See *v. Partridge*, 2 *Id.* 463; *Rodgers v. Rodgers*, 11 *Barb.* 595; *Cahoon v. Bank of Utica*, 7 *N.Y.* (3 *Seld.*) 486; and see *Linden v. Hepburn*, 3 *Sandf.* 668; *S.C.*, 5 *How. Pr.* 188; 9 *N.Y. Leg. Obs.* 80; and *Haire v. Baker*, 5 *N.Y.* (1 *Seld.*) 357.) So, also, when relief is asked for in the alternative. *Stevenson v. Buxton*, 15 *Abb. Pr.* 352; *Barlow v. Scott*, 24 *N.Y.* 40.

9. For a party may have such relief as is adapted to his case from the proofs. (*Hemson v. Decker*, 29 *How. Pr.* 385; *Van Deusen v. Young*, 29 *N.Y.* 29; *Byxbie v. Wood*, *Id.* 610; *Denman v. Prince*, 40 *Barb.* 213; *Butterworth v. O'Brien*, 24 *How. Pr.* 438; *Scott v. Pilkington*, 15 *Abb. Pr.* 280; *Beach v. Cooke*, 39 *Barb.* 306; affirmed, 28 *N.Y.* 508; *Blackmar v. Thomas*, 28 *N.Y.* 67; *Stewart v. Hutchinson*, 29 *How. Pr.* 181; *Simmons v. Eldridge*, 29 *How. Pr.* 309; *Bennett v. Abrams*, 41 *Barb.* 619; *Wait v. Ferguson*, 14 *Abb. Pr.* 379; *Wood v. Brown*, 34 *N.Y.* 337; *Clark v. Griffith*, 24 *N.Y.* 599; *Hosley v. Black*, 28 *N.Y.* 438; *White v. Madison*, 26 *N.Y.* 117.) It will therefore be observed that relief is now administered without reference to the technical and artificial rules of the common law. *Rowe v. Chandler*, 1 *Cal.* 167; *Jones v. Steamship "Cortes,"* 17 *Cal.* 487.

10. The intention of the Legislature was evidently to adopt a "uniform and complete system" (*Humiston v. Smith*, 21 *Cal.* 134) whereby the old and cumbersome forms of pleading would be dispensed with. Yet the facts constituting plaintiff's cause of action are required to be stated as fully under the new practice as under the old. *Miller v. Van Tassel*, 24 *Cal.* 463; *Walter v. Bennett*, 16 *N.Y.* 250; *Mayor of N.Y. v. Parker Vein S.S. Co.*, 21 *How. Pr.* 289; 12 *Abb. Pr.* 300; *Andrews v. Bond*, 16 *Barb.* 633; *Seller v. Sage*, 12 *Barb.* 531; *Cole v. Reynolds*, 18 *N.Y.* 74; *Barlow v. Scott*, 24 *N.Y.* 40; *Emery v. Pease*, 20 *N.Y.* 62; *Phillips v. Gorham*, 17 *N.Y.* 270; *Crary v. Goodman*, 12 *N.Y.* 266; *Dobson v. Pearce*, *Id.* 156; *Giles v. Lyon*, 4 *N.Y.* 600.

OF WHAT PLEADINGS CONSIST.

11. Pleading consists in alleging facts upon the one side and denying them upon the other. (*Buddington v. Davis*, 6 *How. Pr.* 402.) But the facts so alleged always presuppose some rule of law applicable to them. (*Gould's Pl.* §§ 2 and 3.) And hence in all complaints, while the *law* governing the *facts* and the facts coming within the law, taken together, exhibit the cause of action, yet the facts are expressed, while the law is understood, for it would be of no avail "for either party to state facts of which no principle of law could be predicated in his favor." (*Gould's Pl.* 2.) Therefore the pleader first inquires by reference to the law for a remedy, and if he finds there is no legal remedy, he at once knows there has been no wrong, *known to the law*, committed, and that the courts can give no relief.

12. As fictitious issues are by the Code abolished (*N.Y. Code*, § 72 ; *Snell v. Loucks*, 12 *Barb.* 385), analogies of the old system of pleading are not in all cases a safe guide under the Code. (*Bush v. Prosser*, 1 *Kern.* 347.) Two prominent elements intended in the new system are, that *falsehood* should not be put upon the record, and that the pleadings should disclose the *facts* relied on in support or defense of an action. *Id.*

DISTINCTION BETWEEN THE PLEADINGS AND THE ACTION.

13. The difference between the pleadings and the action is that the pleadings show the *nature of the demand*, and the defense; or in common terms, the pleadings are, the complaint and answer ; (1 *Bur. Law. Dict.*

38;) while the action is the *history of the whole cause*, including: *First*, The complaint, which names the parties, and states the injury suffered. *Second*, The process, which brings the parties into court to answer as to these injuries. *Third*, The answer of defendant, which admits, or denies, or avoids, etc. *Fourth*, The trial, wherein the nature of the demand and defense are presented by legal proofs. *Fifth*, The judgment, wherein the Court allows or refuses the remedy asked. *Sixth*, The execution, by which the legal rights of the parties are obtained.

14. It is provided by the Code that "the pleading on the part of the plaintiff shall be the complaint or demurrer to defendant's answer; and on the part of the defendant, the demurrer and answer. (*Cal. Pr. Act*, § 38.) Since the statutes of our State have in express terms defined what the pleadings are, it requires no reference to the text-books on the subject for further definition.

15. It is also provided by statute that "when a defendant is entitled to relief, as against the plaintiff alone, or against the plaintiff and a co-defendant, he may make a separate statement in his answer, of the necessary facts, and pray for the relief sought, without bringing a distinct cross action;" so that parties litigant may settle all questions of difference between them, so far as is practicable, in one action, and not litigate by piecemeal. Interminable *litigation* is not favored by our Legislature nor by our courts, the decisions being numerous and pointed on this subject.

16. It will be our purpose, therefore, to consider the

subject of *pleadings* herein; reserving the consideration of the *action* for future chapters, where the various steps will be considered under their appropriate heads.

FACTS ONLY MUST BE STATED.

17. In the decision of the Supreme Court in the case of *Green v. Palmer* (15 Cal. 411), it is made a rule that "facts only must be stated." (See, also, 1 *Van Santv.* 244; 2 *Till. & Shear.* 8.) The reasons for the existence of these facts are not to be given, but only the naked facts, disrobed of any circumstance connected with or pertaining to them; and this without inferences, or conclusions, argument, hypothetical statements, or statements of the law, or of the pretenses of the opposite party.

18. If A. is indebted to B. in the sum of five hundred dollars, state the fact and for what he is indebted; if for work and labor done, say so, and aver what it is reasonably worth if there was no special contract, and that the same is due, and stop there; if for goods sold and delivered, state that fact, and when, where, and to whom sold, what they are worth, and what is due, and stop there; if on a promissory note, state the amount of indebtedness, and that it is upon a promissory note bearing date, etc., (the note is usually copied, but not necessarily so,) and that the note has not been paid. Of course, in every case judgment must be demanded for the amount due, stating how much, and for interest if any, and costs.

19. In the first example, "for work and labor done," it is not in general necessary to state how A. happened

to work for B., or how B. happened to employ A. Such, and other kindred facts might become valuable in the course of the trial, as *evidence* but not as averments in the pleading. In the second example, "for goods sold," it is not necessary to aver *how* they were sold or *why* they were sold, nor anything further than that they *were* sold to B. at his request, for so much money, and that B. has failed to pay for them. The kind of goods sold and the price or value of each article, are questions of evidence which need not be stated in the pleading. In the third example, it need not be stated that the note was made for a valuable consideration, or that it was made for any consideration. It is presumed to have been made for a consideration, and if it was not really so made the defense will develop the fact. It will be seen, therefore, that the *facts* must be carefully distinguished from the *evidence of the facts*, since the latter pertains to the trial, and not to the pleadings.

20. Argument is improper in a pleading, and should never be inserted; (1 *Van Santv.* 355; *Steph. Pl.* 383;) as a good pleading should be true, unambiguous, consistent, and certain to a common intent, as to time, place, person, and quantity, and not redundant or argumentative. *Boyce v. Brown*, 7 *Barb. S. C. R.* 85; *Green v. Palmer*, 15 *Cal.* 414; *Gallagher v. Dunlap*, 2 *Nev.* 326; *Alderman v. French*, 1 *Pick.* 1; *Atwood v. Caswell*, 19 *Pick.* 493; *Austin v. Parker*, 13 *Pick.* 222.

CONCLUSIONS OF LAW.

21. An allegation of a legal conclusion is one which gives no fact, but matter of law only. (*Hatch v. Peet*,

23 *Barb.* 583.) Such averments are not tolerated by our practice; the facts from which the conclusions follow must be averred, but not the conclusions. (1 *Van Santv.* 244; 1 *Whitt. Pr.* 563; *Levinson v. Schwartz*, 22 *Cal.* 229; *Cantine v. Clark*, 41 *Barb.* 629; *McGee v. Barber*, 14 *Pick.* 212; *White v. Madison*, 26 *N.Y.* 117; *Haight v. Child*, 36 *Barb.* 186; *Commercial Bk. of Rochester v. Rochester*, 41 *Barb.* 341; *Butler v. Viele*, 44 *Barb.* 166; *Carter v. Koezley*, 9 *Bosw.* 583.) *The following may be regarded as conclusions of law:*

22. Arose out of the Transaction.—That an indebtedness arose out of the transaction, is a conclusion of law. *Brown v. Buckingham*, 11 *Abb. Pr.* 387.

23. Assent.—The knowledge and assent of a party is a legal conclusion. (*Moore v. Westervelt*, 2 *Duer*, 59; 1 *Bosw.* 357; 21 *N.Y.* 103.) So in the case of a promissory note made by a co-partner. *Kemeys v. Richards*, 11 *Barb.* 312.

24. Bona Fide Holder and Owner.—That a party is the holder and owner, as of a promissory note. *White v. Brown*, 14 *How. Pr.* 282.

25. Bound.—Whether a carrier is bound to know the contents of a package. (*Berley v. Newton*, 10 *How. Pr.* 490.) That the defendant was "bound to repair." (*Casey v. Mann*, 5 *Abb. Pr.* 91.) That defendant became or was lawfully bound by the rendition of a judgment against him. *People v. Supervisors*, 27 *Cal.* 655; *People v. Commissioners of Fort Edward*, 11 *How. Pr.* 89.

26. Contrary to Law.—That the defendants have acted contrary to the act (statute), is a conclusion of law. *Smith v. Lockwood*, 13 *Barb.* 209.

27. Control and Management.—That a defendant, as executrix, controls and manages the estate of the deceased, and is responsible therefor. *Phinney v. Phinney*, 17 *How. Pr.* 197.

28. Credit.—That the goods were purchased "on credit" and that the "terms of credit" had not expired. *Levinson v. Schwartz*, 22 *Cal.* 229.

29. Due.—That a certain amount is due upon a note. *Frisch v. Caler*, 21 *Cal.* 71; *McKyring v. Bull*, 16 *N.F.* 303; *Allen v. Patterson*, 3 *Seld.* 480.

30. Due and Owing.—That a sum is “due and owing.” *Keteltas v. Meyers*, 3 *E. D. Smith*, 83.

31. Duly.—If “duly” has any clear legal signification, it is a question of law to be determined on the facts. (*Graham v. Machado*, 6 *Duer*, 517.) That the plaintiff was *duly appointed* chamberlain was held sufficient. (*Platt v. Stout*, 14 *Abb. Pr.* 178.) That plaintiff sued by a guardian duly appointed, if the statement is deemed too general, the proper course is to move to make it definite. (*Séré v. Coit*, 5 *Abb. Pr.* 482.) That the trustees were duly appointed. (*Conger v. Holliday*, 3 *Edw. Ch.* 570.) That the plaintiff was *duly authorized* to bring the action. (*Myers v. Machado*, 6 *Abb. Pr.* 198; 14 *How. Pr.* 149.) That a meeting was duly convened would imply that it was regularly convened. (*People v. Walker*, 23 *Barb.* 305; 2 *Abb. Pr.* 422.) That the location was duly and properly made according to the provisions of an act. *People v. Jackson*, 24 *Cal.* 632.

32. Duty.—That it was or is the “duty” of a party to do or forbear an act, is a conclusion. *City of Buffalo v. Holloway* 3 *Seld.* 493; *Rex v. Everett* 8 *B. & C.* 114.

33. Indebted.—That a party is indebted or remains indebted. (*Curtis v. Richards*, 9 *Cal.* 33; *Wells v. McPike*, 21 *Id.* 215; *Chamberlain v. Kaylor*, 2 *E. D. Smith*, 139; *Hall v. Southmayd*, 15 *Barb.* 32.) Or became indebted. *Cal. State Tel. Co. v. Patterson*, 1 *Nev.* 151.

34. In Violation.—*Schenck v. Naylor*, 2 *Duer*, 678;

35. Lawful Holder.—That one was the “lawful holder.” *Beach v. Gallup*, 2 *N.F. Code R.* 66; but see *Taylor v. Corbiere*, 8 *How. Pr.* 387.

36. Lawful Title and unlawfully withholds. *Lawrence v. Wright*, 2 *Duer*, 674; see, however, *Walter v. Lockwood*, 23 *Barb.* 233; 4 *Abb. Pr.* 307; *Ensign v. Sherman*, 13 *Id.* 35.

37. Liable.—That one is “liable.” *Rex v. Upton-on-Severn*, 6 *C. & P.* 133.

38. Nearer of Kin.—That a party is “nearer of kin.” Pub. Admr. *v.* Watts, 1 *Paige*, 348.

39. Necessary Supplies.—That supplies furnished to a vessel are *necessary*. The “Gustavia,” *Blatchf. & H.* 189.

40. Obligation.—That he had failed to fulfill his obligations. Van Schaack *v.* Winne, 16 *Barb.* 95.

41. Ordinance is Legal.—That an ordinance passed by a municipal corporation is legal. People *v.* Supervisors, 27 *Cal.* 655.

42. Owes.—That the defendant owes the plaintiff the sum before mentioned. Millard *v.* Baldwin, 3 *Gray*, 484; Codding *v.* Mansfield, 7 *Id.* 272; 13 *Gray*, 392.

43. Owner.—That a party is owner. Adams *v.* Holley, 12 *How. Pr.* 330; Thomas *v.* Desmond, *Id.* 321; *contra*, Davis *v.* Hoppock, 6 *Duer*, 256; Walter *v.* Lockwood, 23 *Barb.* 233; 4 *Abb. Pr.* 307; McMurray *v.* Gifford, 5 *How. Pr.* 14; Bentley *v.* Jones, 4 *How. Pr.* 204.

44. Owner and Holder.—That plaintiff is owner and holder of a note. Poorman *v.* Mills, 35 *Cal.* 118; approving Wedderspoon *v.* Rogers, 32 *Cal.* 569; Witherspoon *v.* Van Dolar, 15 *How. Pr.* 266.

45. Power and Authority.—That a corporation had full power and lawful authority to do a particular act. Branham *v.* Mayor of San Jose, 24 *Cal.* 585.

46. Promised to Pay.—That defendant promised to pay, in the common courts in *assumpsit*. Wilkins *v.* Stidgers, 22 *Cal.* 232.

47. Release.—That a party “did execute a release in full.” (Hatch *v.* Peet, 23 *Barb.* 575.) “That a settlement had no *reference* to this claim, nor was the same in any way released or affected.” Jones *v.* Phoenix Bk., 4 *Seld.* 235.

48. Repeated Acknowledgements.—Bloodgood *v.* Bruen, 4 *Seld.* 366.

49. Right of Possession.—That right of possession was forfeited by non compliance with rules and customs. Dutch Flat *v.* Mooney, 12 *Cal.* 534.

50. Sole Owner.—That a party is sole owner. *Thomas v. Desmond*, 12 *How. Pr.* 321; see, however, *Holstein v. Rice*, 15 *Id.* 1.

51. Subject to Mortgage.—That defendant took land subject to mortgage. *Warmouth v. Hatch*, 33 *Cal.* 121.

52. Title to Money.—That plaintiff is entitled to the sum of money demanded. *Drake v. Cockroft*, 1 *Abb. Pr.* 203.

53. Trust.—That by the laws of the State a trust was created. *Throop v. Hatch*, 3 *Abb. Pr.* 25.

54. Undertake to Deliver.—"That he did not by his agreement undertake to deliver the land from all incumbrances." *Warner v. Hatfield*, 4 *Blackf.* 394.

55. Unjust Refusal.—That a refusal is unjust, is a conclusion of law. *Re Prime*, 1 *Barb.* 352.

56. Validity.—That a note never had any validity. (*Burrall v. Bowen*, 21 *How. Pr.* 378.) What is the meaning of validity and effect of a contract? *Latham v. Westervelt*, 26 *Barb.* 256; *Chapin v. Potter*, 1 *Hill.* 366.

57. Were Discontinued.—That actions were discontinued, is a conclusion of law. *Hatch v. Peet*, 23 *Barb.* 583.

58. Wrongfully and Unlawfully, when used in connection with issuable facts, are surplusage, and had better be omitted. *Halleck v. Mixer*, 16 *Cal.* 574; *Payne v. Treadwell*, 16 *Cal.* 220; *Lay v. Neville*, 25 *Id.* 545; *People v. Supervisors*, 27 *Id.* 655; *Richardson v. Smith*, 29 *Id.* 529; *Miles v. McDermott*, 31 *Id.* 271; *People ex rel. Haws v. Walker*, 2 *Abb. Pr.* 421; *Fletcher v. Calthrop*, 1 *New Mag. Cas.* 541; *Ensign v. Sherman*, 13 *How. Pr.* 37.

59. Other instances of conclusions of law might be enumerated, taken from the decisions of the Supreme Court of the State of California, but we do not deem such necessary. If counsel were permitted to aver conclusions of law, pleadings might be valuable as briefs, but worthless as statements of facts—the latter being the only object of pleadings.

DEFENDANT'S PRETENSES, OR FACTS ANTICIPATING A
DEFENSE.

60 Defendant's pretenses are improper, as they are not the facts of the plaintiff's case. (1 *Whitt. Pr.* 582; *Steph. Pl.* 349; *Green v. Palmer*, 15 *Cal.* 414; *Van Nest v. Talmadge*, 17 *Abb. Pr.* 99; *Hotham v. E. I. Comp.*, 1 *T. R.* 638.) So, facts anticipating a defense ought never to be averred. If such an averment is made in the complaint, the defendant need not traverse it. What is *material* in the *case* may be quite *immaterial* in the *pleading*. The complainant should not erect a structure, and, to show its stability, attempt, but fail, in knocking it down. The plaintiff may be well aware of the defense which will be interposed, but the defendant will be quite as capable of presenting it as the plaintiff. The real effect of such pleading, if allowed, would be to put the opposite party on the stand as a witness, without being obliged to take his whole statement as true. *Gould's Pl.* 75; *Canfield v. Tobias*, 21 *Cal.* 349; *Green v. Palmer*, 15 *Cal.* 414; *Kerr v. Blodgett*, 16 *Abb. Pr.* 137; *Giles v. Betz*, 15 *Abb. Pr.* 285; *Van Demark v. Van Demark*, 13 *How. Pr.* 372.

61. The above is the general rule, but there are exceptions; such as where the original indebtedness is counted on, and then the defense of payment anticipated by allegations of matters of fraud in answer. *Bracket v. Wilkinson*, 13 *How. Pr.* 102; see, also, *Wade v. Rusher*, 4 *Bosw.* 537; and *Tompson v. Minford*, 11 *How. Pr.* 273.

62. An allegation that defendant was of full age when he executed the bond, is the allegation of a fact in anticipation of a defense. (Walsingham's Case, *Plow.* 564; Bovy's Case, 1 *Vent.* 217; *Stowell v. Zouch*, *Plow.* 376.) So of discharge in insolvency and new promise. (*Smith v. Richmond*, 19 *Cal.* 477.) The former is a matter of defense to be set up by the defendant, and the latter a matter of replication, either by way of plea or evidence, as the system of pleading may be. *Id.*

63. Facts which prevent application of statute of limitations are also matters of defense. *Butler v. Mason*, 5 *Abb. Pr.* 40; 16 *How. Pr.* 546; *Sands v. St. John*, 23 *How. Pr.* 140; 36 *Barb.* 628; *Hyde v. Van Valkenburgh*, 1 *Daly*, 416; but see *Brackett v. Wilkinson*, 13 *How. Pr.* 102; *Van Nest v. Talmage*, 17 *Abb. Pr.* 99.

FACTS INDEPENDENT OF THE CAUSE OF ACTION.

64. Facts independent of the cause of action and proper to the affidavit, accompanying a pleading, as in cases of arrest, should not be alleged. *Sellar v. Sage*, 12 *How. Pr.* 531; 13 *Id.* 230; *Union Bank v. Mott*, 6 *Abb. Pr.* 315; *Corwin v. Freeland*, 2 *Seld.* 560; overruling S.C., 6 *How. Pr.* 241; *Barker v. Russell*, 11 *Barb.* 303; 1 *N. Y. Code R.* 57; *Field v. Morse*, 7 *How. Pr.* 12; 8 *Id.* 47; *Lee v. Elias*, 7 *How. Pr.* 116; *Cheney v. Garbutt*, *Id.* 166; 2 *N. Y. Code R.* 1; 3 *Id.* 150, 169, 211; 3 *Sand.* 736; *Putnam v. Putnam*, 2 *N. Y. Code R.* 64; *Atocha v. Garcia*, 15 *Abb. Pr.* 304; *Minor v. Terry*, 6 *How. Pr.* 208; *Frost v. McCarger*, 14 *How. Pr.* 131; *Secor v. Roome*, 2 *N. Y. Code R.* 1; *contra*, *Barber v. Hubbard*, 3 *N. Y. Code R.* 156.) So, of facts

in relation to a contemporaneous agreement in writing varying the terms of a promissory note. *Smalley v. Bristol*, 1 *Mann.* (*Mich. R.*) 153.

IMPLICATIONS AND PRESUMPTIONS OF LAW.

65. Where the law presumes a fact, it need not be stated in a pleading. (1 *Chitt.* 220; 4 *M. & S.* 120; 2 *Wils.* 147; *Steph. on Pl.* 352; 1 *Whitt.* 591; *Partridge v. Badger*, 25 *Barb.* 146; *Tileston v. Newell*, 13 *Mass.* 406; *Dunning v. Owen*, 14 *Mass.* 157; *McGee v. Barber*, 14 *Pick.* 212; *Marsh v. Bulteel*, 5 *Barn. & Ald.* 507; *Frets v. Frets*, 1 *Cow.* 335; *Allen v. Watson*, 16 *Johns.* 205; *Vymor's Case*, 8 *Rep.* 81; *Bac. Ab. Pleas*, i. 7; 2 *Sand.* 305; *Sheers v. Brooks*, 2 *H. Bl.* 120; *Handford v. Palmer*, 2 *Brod. & Bing.* 361; *Wilson v. Hobday*, 4 *M. & S.* 125; *Chapman v. Pickersgill*, 2 *Wils.* 147.) Or, matters of which the Court takes judicial notice need not be alleged. (*Goulett v. Cowdry*, 1 *Duer*, 139.) Or notice *ex officio*. (1 *Sandf.* 262; *Steph. Pl.* 345.) As of a public statute. (*Goulett v. Cowdry*, 1 *Duer*, 139.) But not of ordinances of a municipal corporation. *Harker v. Mayor of N.Y.*, 17 *Wend.* 199.

66. **Agency.**—That presentation of note by a bank was “as agents” for plaintiff and not as owners, is presumed. *Farmers and Mechanic's B'k of Genessee v. Wadsworth*, 24 *N.Y.* 547.

67. **Death of Ancestor.**—The allegation that one is heir of A. implies the death of A., for *nemo est hæres viventis*. (*Broom's Leg. Max.* 393.) Though the term “heir” may denote heir apparent. *Lockwood v. Jessup*, 9 *Conn. R.* 372; *Cox v. Beltzhoover*, 11 *Mo.* 142.

68. **Delivery of a Specialty.**—The delivery of a specialty, though essential to its validity, need not be stated in a pleading.

1 *Chitt. Pl.* 364; 1 *Saund.* 291; 10 *How. Pr.* 274; 12 *Id.* 452; 15 *N.Y.* 425; *Lafayette Ins. Co. v. Rogers*, 30 *Barb.* 491.

69. Incorporation.—In New York, that a business corporation made and delivered its promissory note, sufficiently states a valid contract. A legal consideration may be presumed. *Lindsley v. Simonds*, 2 *Abb. Pr. (N.S.)* 79; *Wood v. Wellington*, 30 *N.Y.* 218; *Phoenix Bk. of N.Y. v. Donnell*, 41 *Barb.* 571.

70. In Writing.—Averment of acceptance implies "in writing." *Bank of Lowville v. Edwards*, 11 *How. Pr.* 216.

71. Jurisdiction.—The jurisdiction of a court of record of a sister state will be presumed. It is sufficient to allege that judgment was duly recovered. *Halstead v. Black*, 17 *Abb. Pr.* 227.

72. Non-Payment.—That defendant has not paid, is implied in the allegation that there is due and owing, etc. *Keteltas v. Meyers*, 19 *N.Y.* 233; *Holeman v. De Gray*, 6 *Abb. Pr.* 79.

73. Official Capacity of executor is implied. *Scranton v. Farmers and Mechanics Bank*, 24 *N.Y.* 424.

74. Ownership.—Possession of negotiable paper indorsed in blank by the payee thereof, is *prima facie* evidence of ownership. *Bedell v. Carll*, 33 *N.Y.* 591; *Brainerd v. N. Y. & Harlem R. R. Co.*, 10 *Bosw.* 332.

75. Promise.—In a great many cases where a legal obligation exists, the law will imply a promise. This has been stated to be an inference or conclusion of law from the legal liability; (*Gould's Pl.* 330;) but the report in *Kinder v. Paris* (2 *H. Bl.* 562) says that from the antecedent debt or duty the law presumes the defendant did in fact promise to pay, and LORD HOLT is reported to have said that there was no such thing as promise in law. (*Parkins v. Wollaston*, 6 *Mod.* 131.) So, a sale of goods or loan of money necessarily imply a promise, and a consideration, and a mutual contract. See notes to (*Osborne v. Rogers*, 1 *Saund.* 264; *Victor v. Davies*, 1 *M. & W.* 758; *Emery v. Fell*, 2 *T.R.* 28; *Glenny v. Hitchens*, 4 *How Pr.* 98.) And the law makes no distinction between an implied promise and an express promise. (*Kinder v. Paris*, 2 *H. Bl.* 563; *Chitt. on Cont.* 19.) See discus-

sion on this subject of promise in (*Hall v. Southmayd*, 15 *Barb.* 34-6.) See, also, *Cropsey v. Sweeney*, 27 *Barb.* 310; *Farron v. Sherwood*, 17 *N.Y.* 230; *Berry v. Fernandez*, 1 *Bing.* 338; *Durnford v. Messiter*, 5 *Man. & S.* 446.

76. Proportion of Liability of Surety.—The proportion that a surety has to pay is implied. *Van Demark v. Van Demark*, 13 *How. Pr.* 372.

77. Public Officer.—In a suit by a public officer in his name of office, his due appointment thereto is implied. *Fowler v. Westervelt*, 40 *Barb.* 374.

78. Statute.—As to implications arising in actions brought under a statute, see *Freeman v. Fulton Fire Ins. Co.*, 38 *Barb.* 247; *Washburn v. Franklin*, 18 *Barb.* 27; 7 *Abb. Pr.* 8; *Merwin v. Hamilton*, 6 *Duer*, 248; *Peel v. Yellis*, 4 *Johns.* 304.

MATERIAL AVERMENTS.

79. A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient. (*Cal. Pr. Act.* § 66; *Oregon Code*, § 93.) There is no question of more importance to the pleader than what is and what is not a material allegation; or, in other words, what is necessary to be stated in a pleading, and what ought to be omitted. In the case of *Green v. Palmer* (15 *Cal.* 414), this question is elaborately discussed, and the true rule is there laid down in the clearest and most logical manner.

80. The following questions will decide in most cases whether an allegation be material: Can it be made the subject of a material issue? (*Green v. Palmer*, 15 *Cal.* 414; *Martin v. Kanouse*, 2 *Abb. Pr.* 330; *Massina v. Clark*, 17 *Abb. Pr.* 188; *Cahill v. Palmer*, *Id.* 196.) Or, if it be denied, will the failure to prove

it decide the case in whole or in part? (*Green v. Palmer*, 15 *Cal.* 414.) Such material averment cannot be presumed from the existence of other facts. 1 *Van Santv.* 773-4; 15 *Barb.* 34, 35; *Van de Sande v. Hall*, 13 *How. Pr.* 458.

ESSENTIAL FACTS ONLY ARE MATERIAL.

81. What facts are essential in a pleading is sometimes a question which puzzles the pleader, yet it should not. The following tests will determine whether certain allegations are unnecessary. (1 *Van Santv.* 319, 320.) *First*, Can the allegation be stricken from the pleading without leaving it insufficient? (*Whitwell v. Thomas*, 9 *Cal.* 499.) *Second*, Can it be stricken from the pleading without impairing any portion of plaintiff's cause of action? (*Green v. Palmer*, 15 *Cal.* 414.) *Third*, Can it be stricken from the pleading without an injury to plaintiff or a benefit to defendant, however remote this injury or benefit may be?

82. The *essential* facts only should be averred; for should the pleadings be so framed that even the least important *essential* fact is left out, the cause of action is impaired. What plaintiff ought to *aver* and what he *must prove* are, we repeat, entirely distinct propositions. If the pleader were required to aver every fact necessary to prove his case, most pleadings would be of great length. The pleadings should be concise and to the point. "There never was a greater slander upon the Code, than that it permits long pleadings." *Green v. Palmer*, 15 *Cal.* 417.

IMMATERIAL, IRRELEVANT, AND REDUNDANT MATTER.

83. Irrelevant, immaterial, unessential, redundant, and surplus allegations should be omitted from a pleading. (*Green v. Palmer*, 15 *Cal.* 414.) Such allegations or denials present no issue. (1 *Van Santv.* 76; *Maretzek v. Cauldwell*, 19 *Abb. Pr.* 35.) And if such matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby. *Cal. Pr. Act*, § 57; *Nevada*, § 57; *Idaho*, § 57; *Arizona*, 57; *N.Y. Code*, § 160; *Oregon*, § 84; *Larco v. Casaneuava*, 30 *Cal.* 560; *Boles v. Cohen*, 15 *Cal.* 150; *Hampshire Manuf. Bk. v. Billings*, 17 *Pick.* 87; *Lord v. Tyler*, 14 *Pick.* 156; *Cahill v. Palmer*, 17 *Abb. Pr.* 196; *Moffatt v. Pratt*, 12 *How Pr.* 48.

84. Irrelevant matter in a pleading is that which has no bearing on the subject matter of the controversy. (*Fabricotti v. Launitz*, 1 *Code R. (N.S.)* 121; *Stafford v. Mayor of Albany*, 6 *Johns.* 25; *Van Rensselaer v. Brice*, 4 *Paige*, 177; *Perrine v. Farr*, 2 *Zab.* 356; *Lee Bk. v. Kitching*, 11 *Abb. Pr.* 435; *Cahill v. Palmer*, 17 *Abb. Pr.* 196.) Surplusage is matter altogether superfluous and useless, and which may be rejected by the Court, and the pleadings stand as if it were stricken out or had never been inserted. *Gould's Pl.* 143.

85. So, a false construction in law upon the terms of a contract, will be regarded as surplusage, and on motion will be stricken out. (*Stoddard v. Treadwell*, 26 *Cal.* 294.) Or superfluous matter, when inserted by itself. (1 *Van Sant.* 311; *Boles v. Cohen*, 15 *Cal.* 150.) So, when the name of the wife is improperly or unneces-

sarily joined with that of her husband, it may be regarded as surplusage. (*Warner v. Steamer "Uncle Sam,"* 9 *Cal.* 697.) So of inconsistent allegations. (1 *Van Santv.* 353, 519; *Uridias v. Morrill*, 25 *Cal.* 31; *Klink v. Cohen*, 13 *Id.* 623.) Or allegations which are absurd, or the truth of which is impossible. *Sacramento Co. v. Bird*, 31 *Cal.* 66.

86. So of allegations which are redundant, although the facts averred are relevant, as by a needless repetition even of material averments. 1 *Chitt. Pl.* 227; *Cowp.* 665; *Doug.* 668; *Bowman v. Sheldon*, 5 *Sand.* 660; *Rost v. Harris*, 12 *Abb. Pr.* 446; *Benedict v. Seymour*, 6 *How. Pr.* 303; *Clough v. Murray*, 19 *Abb. Pr.* 97.

87. Any matter which may tend to limit or qualify the degree of certainty, is redundant matter or surplusage; for example, matter of mere evidence, legal conclusions, things within judicial notice, matter coming more properly from the other side, or matter necessarily implied. (*Steph. Pl.* 423.) Though in its more strict and confined meaning, redundancy imports matter wholly foreign and irrelevant. *Id.* 422; *Barstow v. Wright*, *Doug.* 667; 1 *'Saund.* 233; *Yates v. Carlisle*, 1 *Black. Rep.* 270; *Plowd. Comm.* 232; *Lord v. Houston*, 11 *East.* 62; *Cobbett v. Cochrane*, 8 *Bing.* 17; *Bacon v. Ashton*, 5 *Dowl.* 94; *Palmer v. Gooden*, 8 *M. & W.* 890; *Stevens v. Bigelow*, 12 *Mass.* 438; *Hampshire Manf. Bank v. Billings*, 17 *Pick.* 87; *Simpson v. McArthur*, 16 *Abb. Pr.* 302.

88. Conclusions of law inserted in a pleading may be considered as mere surplusage. (*Halleck v. Mixer*, 16 *Cal.* 574.) So of evidence when inserted in a plead-

ing. (*Green v. Palmer*, 15 *Cal.* 414; *Bowen v. Aubrey*, 22 *Cal.* 566.) Or probative facts, such as averments of deraignment of title. (*Larco v. Casaneuava*, 30 *Cal.* 560; *Wilson v. Cleaveland*, *Id.* 192; Or hypothetical statements. See *Ante*, note 17; 1 *Van Santv.* 358; *Green v. Palmer*, 15 *Cal.* 414; *Wise v. Fanning*, 9 *How. Pr.* 543; *Brown v. Ruckman*, 12 *How. Pr.* 313.

89. Matter inserted in a pleading obnoxious from uncertainty, as where the fact which constitutes the cause of action is not stated clearly, will be considered as surplusage. (*Arrietta v. Morrissey*, 1 *Abb. Pr. (N.S.)* 439.) So of matter contained in a pleading, which is frivolous. (*Smith v. Countryman*, 30 *N.Y.* 655; *Lockwood v. Sallenger*, 18 *Abb. Pr.* 136; *Van Valen v. Lapham*, 13 *How. Pr.* 240.) Or allegations ambiguous or repugnant to each other. 1 *Chitt. Pl.* 377; 1 *Van Santv.* 354; *Com. Dig. (C. 23)*; *Bac. Abr. Pleas*, i. 4; *Vin. Ab. Abatement*; *Sibley v. Brown*, 4 *Pick.* 137; *Wyatt v. Ayland*, 1 *Salk.* 324; *Nevill v. Soper*, *Id.* 213; *Butt's Case*, 7 *Rep.* 25; *Hutchinson v. Jackson*, 2 *Lut.* 1,324; *Hart v. Longfield*, 7 *Mod.* 148; *Byass v. Wylie*, 1 *C. M. & R.* 686.

90. A commingled statement of two causes of action that must properly be united in one (1 *Van Santv.* 344; *Harsen v. Bayaud*, 5 *Duer.* 656), or the names of parties improperly joined, may be stricken out. *Yeates v. Walker*, 1 *Duwall (Ky.)* 84.

91. But a material allegation cannot be stricken out, because the pleader also claims relief which cannot be granted. (*Woodgate v. Fleet*, 9 *Abb. Pr.* 222.) Nor where the information required was obtainable by

demand of particulars. (*Crockroft v. Atlantic Mut. Ins. Co.*, 9 *Bosw.* 681.) Nor to obtain details as to contents of a lost instrument, of which the nature and effect have been stated. *Kellogg v. Baker*, 15 *Abb. Pr.* 286.

92. If the immaterial matter constitute part of a material averment, so that the whole cannot be stricken out without destroying the right of action or defense of the party, it cannot be rejected as surplusage, but may be traversed in the pleading, and must be proved as laid, though the averment be more particular than need be. The true rule is that whenever the whole allegation can be stricken out without affecting the legal right set up by the party, it is impertinent, and may be rejected as surplusage. *United States v. Burnham*, 1 *Mass.* 57; *Wyman v. Fowler*, 3 *McLean*, 467.

93. An entire pleading cannot be stricken out as irrelevant or redundant. (*Benedict v. Dake*, 6 *How. Pr.* 352; *Nichols v. Jones*, *Id.* 355; *Hull v. Smith*, 8 *Id.* 150; *Howell v. Knickerbocker Li. Ins. Co.*, 24 *How. Pr.* 475; *Blake v. Eldred*, 18 *How. Pr.* 240.) For practice on remedy by striking out, see Amendments, Vol. ii. Chapter iv.

SUCH FACTS ONLY AS CONSTITUTE A CAUSE OF ACTION,
THE DEFENSE, OR THE REPLY, MUST BE STATED.

94. Only such *essential facts* as constitute the cause of action, the defense, or the reply, must be stated in the pleadings. Each party must allege, *First*, What he is required to prove, as he will be precluded from proving any fact not alleged. (1 *Van Santv.*

774; 1 *Chitt. Pl.* 214; *Green v. Palmer*, 15 *Cal.* 414; *Piercy v. Sabin*, 10 *Cal.* 22; *Jerome v. Stebbins*, 14 *Id.* 457; *Payne v. Treadwell*, 16 *Id.* 220; *Racouillat v. Rene*, 32 *Id.* 455; *Wilson v. Cleveland*, 30 *Id.* 192; *Haight v. Child*, 36 *Barb.* 186; *People v. Booth*, 32 *N.Y.* 397; *Freeman v. Fulton Fi. Ins. Co.*, 38 *Barb.* 247; *Dolcher v. Fry*, 37 *Barb.* 152; *Kelsey v. Ward*, 16 *Abb. Pr.* 98; *Allen v. Patterson*, 3 *Seld.* 478; *Bailey v. Ryder*, 10 *N.Y.* 363; *Bailey v. Johnson*, 1 *Daly*, 61; *Safford v. Drew*, 3 *Duer*, 632; *McMillan v. Saratoga R.R. Co.*, 20 *Barb.* 455; *Bristol v. Penn. R.R. Co.*, 9 *Id.* 158; *Johnson v. Taylor*, 15 *Abb. Pr.* 339; *Graff v. Bonnett*, 31 *N.Y.* 9; *Tucker v. Randall*, 2 *Mass.* 283; *Brown v. Stimpson*, 2 *Mass.* 441; *Tracy v. Dakin*, 7 *Johns.* 75; *Hyde v. Van Valkenburgh*, 1 *Daly*, 416; *Gardner v. Pollard*, 10 *Bosw.* 674; *Fowler v. N.Y. Indem. Ins. Co.*, 26 *N.Y.* 422; *Lombardo v. Case*, 45 *Barb.* 95; *Donovan v. Mayor of N.Y.*, 44 *Barb.* 180.

95. Every fact which, if controverted, must be proved, should be stated. (*Jerome v. Stebbins*, 14 *Cal.* 22; *Tolmie v. Dean*, *Wash. Terr.* 60; *Griggs v. St. Paul*, 9 *Minn.* 246; *Gauntley v. Wheeler*, 31 *How. Pr.* 137; *Arrietta v. Morrissey*, 1 *Abb. Pr. (N.S.)* 439; *Boutwell v. Townsend*, 37 *Barb.* 205; *Plumtree v. Dratt*, 41 *Barb.* 333.) As it is a cardinal rule in equity, as in all other pleading, that the *allegata* and *probata* must agree, and averments material to the case omitted from the pleading cannot be supplied by the evidence. (1 *Greenleaf*, 18; 1 *Whitt. Pr.* 575; *Green v. Covillaud*, 10 *Cal.* 317; *Stout v. Coffin*, 28 *Cal.* 65.) In cases where complaint was deficient, see *Rapallee v. Stewart*, 27 *N.Y.* 510; *Covenhoven v. City of Brooklyn*, 38 *Barb.* 9; *Van Zandt v. Mayor of N.Y.*, 8 *Bosw.* 375; *Solms*

v. Lias, 16 *Abb. Pr.* 311; *Bailey v. Johnson*, 1 *Daly*, 61; *Curtiss v. Marshall*, 8 *Bosw.* 22.) In cases where answer was deficient, see *Fry v. Bennett*, 28 *N.Y.* 324; *Anable v. Conklin*, 25 *N.Y.* 470; *Osborn v. Robbins*, 37 *Barb.* 481; *Button v. McCauley*, 38 *Barb.* 413; *Sandford v. Travers*, 7 *Bosw.* 498; *Kelsey v. Ward*, 16 *Abb. Pr.* 98; *Dingledein v. Third Av. R.R. Co.*, 9 *Bosw.* 79; *Kniffin v. McConnell*, 30 *N.Y.* 285; *Morrell v. Irving Fi. Ins. Co.*, 33 *N.Y.* 429; *Raynor v. Timerson*, 46 *Barb.* 518; *Allen v. Mercantile Mar. Ins. Co.*, 46 *Barb.* 642.

96. The proofs must substantially conform to and sustain the pleadings. (*McKinlay v. Morrish*, 21 *How. U. S.* 343; *Campbell v. The "Uncle Sam,"* 1 *McAll.* 77; *Kramme v. The "New England," Newb.* 481.) But an allegation in a pleading does not estop the party pleading it from proving that the allegation is not correct—unless the allegation is made an issuable fact. *Paterson v. The Keystone Mining Co.*, 30 *Cal.* 360.

97. In pleading, it is the ultimate and not the probative facts which should be averred, and evidence should be admitted to establish probative facts not averred in the pleading. (*Grewell v. Walden*, 23 *Cal.* 165; *Moore v. Murdock*, 26 *Cal.* 514; *Miles v. McDermot*, 31 *Cal.* 271; *Depuy v. Williams*, *Id.* 313; *Marshall v. Shafter*, 32 *Cal.* 176; See *v. Cox*, 16 *Mo.* 166; *Sanders v. Anderson*, 21 *Id.* 402.) For example: title of plaintiff is an ultimate fact in ejectment, while the facts established by plaintiff going to support such title are probative facts. *Marshall v. Shafter*, 32 *Cal.* 176.

98. The expression "*facts* constituting a cause of

action," means those facts which the evidence upon the trial will prove, and not the evidence required to prove their existence. (*Wooden v. Strew*, 10 *How. Pr.* 50; *Dows v. Hotchkiss*, 10 *N.Y. Leg. Obs.* 281; *Carter v. Koezley*, 14 *Abb. Pr.* 150; *Cahill v. Palmer*, 17 *Abb. Pr.* 196.) They are, *physical facts*. (*Lawrence v. Wright*, 2 *Duer*, 674; see *Drake v. Cockroft*, 1 *Abb. Pr.* 203.) *Issuable facts*. (*Green v. Palmer*, 15 *Cal.* 416.) *Real, traversable facts*. (*Mann v. Morewood*, 5 *Sand.* 266.) As before stated, facts and not evidence should be alleged. In other words, it is not necessary in alleging a fact to state such circumstances as merely tend to prove the truth of the fact. *Steph. Pl.* 342.

WHAT SHOULD BE OMITTED.

99. Nothing should be alleged affirmatively which is not required to be proved. (*Green v. Palmer*, 15 *Cal.* 414; *Decker v. Matthews*, 2 *Kern.* 320; *Bank of U. S. v. Smith*, 11 *Wheat.* 171.) For it is the intention of the Code to require the pleadings to be so framed as not only to apprise the parties of the facts to be proved, but to narrow the proofs on the trial; (*Piercy v. Sabin*, 10 *Cal.* 22;) the rule being that the allegations and the proofs must correspond. (*Maynard v. F. F. Ins. Co.*, 34 *Cal.* 48.) And allegations merely formal, *i.e.*, such as require no proof at the trial, are unnecessary. *Ensign v. Sherman*, 14 *How. Pr.* 439.

100. And this is the reason why it is not necessary to aver that a note was given for a "valuable consideration," or, in an action for damages for assault and battery, that A. "wrongfully and unlawfully" beat B.,

or, in an action for libel, for a publication which is libelous *per se*, that it was published "falsely and maliciously;" for it was of course false, or it would not be libelous, and malice will be presumed when the falsehood is shown. But where a consideration is not implied, or a request is essential to the defendant's liability, it must be specially averred in the pleading. *Spear v. Downing*, 12 *Abb. Pr.* 437.

101. The only exception to this rule is to negative a possible performance of the obligation which is the basis of the action, or to negative an inference from an act which is, in itself, indifferent. (*Green v. Palmer*, 15 *Cal.* 411; *Payne v. Treadwell*, 16 *Cal.* 220.) What is inserted in a pleading must be decisive of some part of the cause, one way or the other.

MODE OF STATING FACTS.

102. The facts in a pleading should be stated, *First*, In their logical order. *Second*, By direct averment. *Third*, In ordinary and concise language. *Fourth*, With reasonable certainty.

LOGICAL ORDER OF STATING FACTS.

103. By "logical order" is meant, "natural order." (*Green v. Palmer*, 15 *Cal.* 414.) It is laid down as an essential prerequisite that logical order should be observed in the statement of facts in a pleading. (1 *Chitt. Pl.* 231; *Gould's Pl.* 4; 2 *Till. & Shear.* 8; 1 *Van Santv.* 330.) Consult also the following decisions: *Ives v. Humphreys*, 1 *E. D. Smith*, 201; *Manning v. Whitbeck*, 1 *Law Ref. Tracts*; *Gibbons v. Levy*, 2 *Duer.* 170; and other cases, as 5 *Abb. Pr.*

467 ; 2 *Duer*. 509 ; 4 *How. Pr.* 99 ; 1 *Abb. Pr.* 39 ; 7 *Abb. Pr.* 131 ; 17 *N.Y.* 230 ; 14 *N.Y.* 85 ; 28 *Barb.* 441 ; 1 *Bosw.* 419 ; 10 *How. Pr.* 153 ; 1 *N.Y. Code R. (N.S.)* 99, 174 ; 3 *Sand.* 695 ; 22 *Barb.* 495 ; 15 *Barb.* 34 ; *Jordan v. Morley*, 23 *N.Y.* 552 ; *Farron v. Sherwood*, 17 *N.Y.* 227 ; *Smith v. Leland*, 2 *Duer*. 497 ; *Lee v. Ainslie*, 4 *Abb. Pr.* 467 ; 1 *Hilt.* 277 ; *St. John v. Griffith*, 1 *Abb. Pr.* 39 ; *Page v. Freeman*, 19 *Mo.* 421.

104. It may be observed that in erecting a building, the architect does not commence at the top but at the base, placing each part of his foundation in its proper position, in such a manner that it may not have to be removed or reconstructed. So in framing a pleading it must be remembered that we are making a statement of certain facts which we relate in the order of their occurrence, and the complete narration must be made in concise language and with sufficient certainty, thus constituting the superstructure of the entire transaction. Should we commence at the wrong end of the story, we would be building without a foundation, and the pleading would be unintelligible; or should we relate only the latter part of the transaction, however just or plausible might be our statements, still we would not have stated a cause of action, for there would not be a complete and connected statement of the transaction.

105. It has been held that facts should be stated according to their legal effect. (*Gould's Pl.* 145 ; *Bac. Abr.* i. 7 ; *Co. Litt.* 193 ; *Com. Dig. Pl.* 37 ; 2 *Saund.* 96 ; *Cowp.* 600 ; *Cro. Eliz.* 352 ; *Doug.* 667 ; 2 *Salk.* 574 ; 1 *Ld. Ray.* 400 ; *Lawe's Pl.* 62 ; 1 *T. R.* 446 ; *Steph. Pl.* 389 ; *Boyce v. Brown*, 7 *Barb.* 85 ;

Patterson *v.* Taylor, 1 *N.Y. Code R.* 175; 8 *Barb.* 250; Dolner *v.* Gibson, 3 *N.Y. Code R.* 153; Coggill *v.* Amer. Ex. Bk. 1 *Comst.* 117; Stewart *v.* Travis, 10 *How. Pr.* 153; Bennett *v.* Judson, 21 *N.Y.* 240; Barker *v.* Lade, 4 *Mod.* 150; Howell *v.* Richards, 11 *East.* 633; and other English authorities.) The rule of stating the facts according to their logical order is too well settled to require comment. See Dolner *v.* Gibson, 3 *N.Y. Code R.* 153; St. John *v.* Griffith, 1 *Abb. Pr.* 39; Sherman *v.* N.Y. Cent. R.R., 22 *Barb.* 239.

FACTS MUST BE ALLEGED BY DIRECT AVERMENT.

106. That facts must be alleged by direct averment, and that an averment is a positive statement of a fact as opposed to argument or inference, see (1 *Chitt.* 319; *Cowp.* 683; *Bac. Ab. Pleas, B.*) For instance, it is not an averment that a certain house in San Francisco, known as the "Willows" is a hotel, if it is stated thus: that "certain furniture was furnished for and used in the furnishing of *the hotel* in the City and County of San Francisco, *known as the Willows.*" (*Stringer v. Davis*, 30 *Cal.* 320.) Justice Sanderson in the case referred to, disposes of the complaint by saying: "It was not an allegation that the goods were used in a hotel or used in a building called the Willows, or that such building *was a hotel*; these facts were only stated inferentially." All essential facts—and none others—that should be stated, must be alleged by direct averment. *Moore v. Besse*, 30 *Cal.* 570.

107. One of the reasons why all essential facts should be averred directly and unequivocally, is obvious when we consider that if the language of a pleading

is doubtful, it is construed most strongly against the pleader. *Moore v. Besse*, 30 *Cal.* 570; 1 *Whitt.* 578; *Kingsley v. Bill*, 9 *Mass.* 198; *Doane v. Badger*, 12 *Id.* 69; *Truscott v. Dole*, 7 *How. Pr.* 221; *Radway v. Mather*, 5 *Sand.* 654; *Crocker v. Baker*, 3 *Abb. Pr.* 182; *Levy v. Lay*, 6 *Id.* 90; *Rateau v. Bernard*, 12 *How. Pr.* 464; *Star Steamship Co. v. Mitchell*, 1 *Abb. Pr. (N.S.)* 396; *Butler v. Viele*, 44 *Barb.* 166.

108. Allegations must be positive, not by way of recital. *Steph. Pl.* 387; *Bac. Ab. Pleas, B.*; *Gould's Pl.* 55; *Co. Litt.* 303; 1 *Chitt. Pl.* 231; *Cowp.* 683; *Shafer v. Bear Riv.*, 4 *Cal.* 294; *Denver v. Burton*, 28 *Cal.* 549; *Stinger v. Davis*, 30 *Cal.* 318; *Sherland v. Heaton*, 2 *Bulst.* 214; *Wettenhall v. Shirwin*, 2 *Lev.* 206; *Moss v. Thacker*, 2 *Lev.* 193; *Hove v. Chapman*, 2 *Salk.* 636; *Dunstall v. Dunstall*, 2 *Show.* 27; *Gourney v. Fletcher*, *Id.* 295; *Dobbs v. Edmunds*, *Ld. Raym.* 1,413; *Wilder v. Handy*, *Strange*, 1,151; *Marshall v. Riggs*, *Id.* 1,162; *West v. American Exch. Bank*, 44 *Barb.* 175; *Truscott v. Dole*, 7 *How. Pr.* 221.

109. Especially must facts be positively alleged to entitle the plaintiff to an injunction founded on the allegations of his complaint. (*Crocker v. Baker*, 3 *Abb. Pr.* 182; *Levy v. Lay*, 6 *Id.* 90; *Rateau v. Bernard*, 12 *How. Pr.* 464.) But allegations on information and belief are allowable. (*St. Johns v. Beers*, 24 *How. Pr.* 377; *Howell v. Fraser*, 1 *N.Y. Code R.* 270; 6 *How. Pr.* 221; *Try v. Bennett*, *Id.* 249; *Ricketts v. Green*, 6 *Abb. Pr.* 82; *N.Y. Marbled Iron Works v. Smith*, 4 *Duer*, 574; *Borrowe v. Millbank*, 5 *Abb. Pr.* 28; *Radway v. Mather*, 5 *Sand.* 654.) And to state the nature and source of the information does not vitiate an indepen-

dent averment of such facts. *Burrowe v. Millbank*, 5 *Abb. Pr.* 28.

FACTS MUST BE ALLEGED IN ORDINARY AND CONCISE
LANGUAGE.

110. As pleading is but a narration of the events which constitute the wrong suffered, and a denial of the same or admission thereof by a different statement, these statements must be made in *ordinary and concise language*. (1 *Van Santv.* 35; 22 *How. U.S.* 341. *Green v. Palmer*, 15 *Cal.* 414; *De Witt v. Hays*, 2 *Cal.* 468; *Jones v. Steamer "Cortes,"* 17 *Cal.* 487; *Smith v. Rowe*, 4 *Id.* 6.) That is, in just such language as men use in conveying the knowledge of similar facts one to another. The provision of the Code in this respect is only declaratory of the common law. (*Goodwin v. Stebbins*, 2 *Cal.* 105.) Under our statute, there are no words which have one meaning in a pleading filed in an action, and another meaning when used in common conversation.

111. It was stated by Lord Mansfield, that "the substantial rules of pleading were founded in strong sense and the soundest and closest logic." In a pleading under our statute this remark is eminently applicable. If the pleader would but tell the story of his client's wrongs *upon paper*, as he would in private conversation, very few of his pleadings would be demurrable. For instance, A. meets B. and says: "C. is indebted to me in the sum of one thousand dollars." B. asks: "What for?" When A. answers: "For goods I sold him in January last; and I have just demanded payment, and he has refused to pay me. Here we have

the whole story of A.'s wrongs, and if he should make a complaint spread over many pages, no further facts could be presented, because they do not exist. Or, as another instance, A. might say: "B. has forcibly entered upon my land, and I demanded the possession thereof (describing it) and the damages I have sustained by such forcible entry, but he refused to surrender possession or to pay the damages." This would be a simple statement of the injury sustained and the remedy demanded, which is all that is essential.

FACTS MUST BE ALLEGED WITH SUFFICIENT CERTAINTY.

112. The matter pleaded must be clearly and distinctly stated (*Gould's Pl.* 72), so that the pleadings may be understood by the party who is to answer them. (1 *Chitt. Pl.* 233.) The certainty required in pleading relates chiefly to *time, place, person, and subject matter*, (*Gould's Pl.* 77; *Steph. Pl.* 279.) Facts must be stated with absolute definiteness, and nothing should be left for inference. *Moore v. Besse*, 30 *Cal.* 570; *People v. Supervisors of Ulster*, 34 *N.Y.* 268; *Ferguson v. Harwood*, 7 *Cranch.* 408.

113. All ambiguity must be avoided, as well as language of doubtful meaning, vague or uncertain. (1 *Chitt. Pl.* 236; *Co. Litt.* 303; *Pelv.* 36; 2 *H. Bl.* 530; 5 *M. & S.* 38; 1 *Bar. & Cres.* 297; 3 *Id.* 192; *Steph. Pl.* 378; *Beach v. Bay State Co.*, 10 *Abb. Pr.* 71; *Christey v. Scott*, 14 *How. Pr.* 282.) But mere vagueness is not frivolousness, and is to be corrected by amendment. (*Kelly v. Barnett*, 16 *How. Pr.* 135.) Nor, as before remarked, should such allegations of fact be stated argumentatively. (*Bac. Abr. Pleas*, i. 5; *Com. Dig. E.*;

Co. Litt. 303; 5 *B. & A.* 215; *Dyer*, 43; *Steph. Pl.* 178, 383; *Woods v. Butts*, *Cro. Eliz.* 260; *Ledesham v. Lubram*, *Id.* 870; *Blackmore v. Tidderley*, 11 *Mod.* 38; 2 *Salk.* 423; *Murray v. East Ind. Co.*, 5 *Barn. & Ald.* 215; *Digby v. Alexander*, 8 *Bing.* 416; *Austin v. Parker*, 13 *Pick.* 222.) Nor in the alternative. (*Steph. Pl.* 386; *Stone v. Graves*, 8 *Mo.* 148; *Griffith v. Eyles*, 1 *Bos. & Pul.* 413; *Cook v. Cox*, 3 *M. & S.* 114; *Salters v. Genin*, 10 *Abb. Pr.* 478.) Nor by hypothesis. Such statements are improper, for the Court has to deal with the *facts* in the case, and not with hypotheses. (*Steph. Pl.* 386; *Green v. Palmer*, 15 *Cal.* 414; *Wise v. Fanning*, 9 *How. Pr.* 543; *Brown v. Ruckman*, 12 *How. Pr.* 313; *Griffith v. Eyles*, 1 *Bos. & Pul.* 413; *Cook v. Cox*, 3 *M. & S.* 114; *King v. Breveton*, 1 *Mod.* 330; *Witherley v. Sarsfield*, 1 *Show.* 127; *Rex v. Morley*, 1 *You. & Jer.* 221; *Smith v. London R.R. Co.*, 7 *C. B.*

114. If *time* is material to constitute a cause of action, it should be alleged with sufficient certainty. (*People v. Ryder*, 2 *Kern.* 439.) The day on which it is alleged in the pleading under a *videlicet*, that an act is done, is usually, however, immaterial. (*Lester v. Jewett*, 1 *Kern.* 460; *Lyon v. Clark*, 4 *Seld.* 148; *Ive v. Scott*, 9 *Dowl. Pr. C.* 993; *Dubois v. Beaver*, 25 *N.Y.* 123.) By "not material" in this connection is meant, it may be departed from in the evidence. *Andrews v. Chadbourne*, 19 *Barb.* 149.

115. When it is an essential point, the *place* at which the contract was made must be alleged. See *Thatcher v. Morris*, 1 *Kern.* 440; also, *Vermilyea v. Beatty*, 6 *Barb.* 429; *Beach v. Bay State Co.*, 10 *Abb. Pr.* 71.

116. To make a pleading which is bad in these respects definite and certain, the remedy is by motion. *People v. Ryder*, 2 *Kern* 439 ; *Barnes v. Mattison*, 5 *Barb.* 378 ; *Nash v. Brown*, 18 *Law Jour. Rep. (N.S.)* 62 ; *Payne v. Banner*, 15 *Id.* 227 ; *Marshall v. Powell*, 8 *Law Times*, (2 *B.*) 159 ; and 13 *Jurist*, 126. For remedy by motion, see Vol. ii., *Notices, Motions, and Orders*.

PLEADINGS, HOW CONSTRUED.

117. It will be observed, by what we have before said, that it is not claimed that our Code more than points out and defines certain landmarks by which the pleader may be guided. The rules of the common law, and the decisions of the courts, should be still consulted when a question of the sufficiency of a pleading arises. And all questions pertaining to the common rules of pleading, not expressly directed by statute, remain unchanged. But the Practice Act of California (§ 37) provides. "That all forms of pleadings in civil actions, and the rules by which the sufficiency of pleadings is determined, shall be those prescribed in this Act."

118. *In the construction of a pleading* for the purpose of determining its effects, the allegations shall be liberally construed, with a view to substantial justice between the parties. (*Cal. Pr. Act*, § 70 ; *Nevada Code*, § 70 ; *Idaho*, § 70 ; *Arizona*, § 70 ; *N.Y. Code*, § 159 ; 1 *Van Santv.* 775 ; 1 *Whitt. Pr.* 596 ; *Allen v. Patterson*, 7 *N.Y.* 476 ; *Simmons v. Sissons*, 26 *N.Y.* 264 ; *Blackmar v. Thomas*, 28 *N.Y.* 67 ; *Yertore v. Wiswell*, 16 *How. Pr.* 8 ; *St. John v. Griffith*, 1 *Abb. Pr.* 59 ;

Butterworth *v.* O'Brien, 24 *How. Pr.* 438 ; Simmons *v.* Eldridge, 29 *How. Pr.* 309 ; Stockwell *v.* Wager, 30 *How. Pr.* 271 ; People *v.* Ryder, 12 *N.Y.* 433 ; but see Burke *v.* Thorne, 44 *Barb.* 363.) And with greater liberality when parties go to trial on an issue of fact, than when tested on demurrer. (White *v.* Spencer, 14 *N.Y.* 247 ; St. John *v.* Northrup, 23 *Barb.* 26 ; Cady *v.* Allen, 22 *Barb.* 394.) Or on motion. Wall *v.* Buffalo Wat. Works, 18 *N.Y.* 119 ; Lounsbury *v.* Purdy, 18 *N.Y.* 515 ; Bennett *v.* Judson, 21 *N.Y.* 238 ; Bank of Havana *v.* Magee, 20 *N.Y.* 355.

119. Substantial justice means *substantial legal justice*, to be ascertained and determined by fixed rules and positive statutes. (Stevens *v.* Ross, 1 *Cal.* 95.) That allegations should be liberally construed, does not mean that the omission of substantial averments should be disregarded. (Kœnig *v.* Nott, 2 *Hilt.* 325 ; Spear *v.* Downing, 34 *Barb.* 523 ; 12 *Abb. Pr.* 437.) Since the law will not assume anything in favor of a party, which he has not averred. Cruger *v.* Huds. Riv. R.R. Co., 2 *Kern.* 201.

120. Words are to be construed according to their popular sense. (1 *Chitt.* 238 ; Backus *v.* Richardson, 5 *Johns.* 584 ; Woodbury *v.* Sackrider, 2 *Abb. Pr.* 405 ; Mann *v.* Morewood, 5 *Sand.* 557 ; Woolmoth *v.* Meadows, 5 *East*, 463 ; Roberts *v.* Camden, 9 *East*, 93 ; Respublica *v.* De Longchamps, 1 *Dall.* 114 ; Rue *v.* Mitchell, 2 *Dall.* 59 ; Brown *v.* Lamberton, 2 *Binney*, 37 ; Pelton *v.* Ward, 3 *Caines*, 76.) The subject is fully discussed in Walton *v.* Singleton, 7 *Serg. & R.* 449 ; see Harrison *v.* Stratton, 4 *Esp.* 218.

IMPLICATIONS AND PRESUMPTIONS.

121. Acceptance implies a due acceptance. (*Graham v. Machado*, 6 *Duer*, 514; *Bk. of Lowville v. Edwards*, 11 *How. Pr.* 216.) An allegation that certain drafts were accepted by a corporation, by their treasurer, includes an averment of authority in the treasurer to accept. *Partridge v. Badger*, 25 *Barb.* 146.

122. Continuance of Ownership will be presumed where the allegation states ownership on a certain day. 24 *Barb.* 366.

123. Conversion implies a wrongful conversion. *Young v. Cooper*, 20 *Law Jour. R. Ex.* 136; 6 *Ex.* 62.

124. Delivery.—Allegations of making a written instrument imply delivery. 1 *Chitt. Pl.* 364; citing *Peets v. Bratt*, 6 *Barb.* 660; *Prindle v. Caruthers*, 15 *N.Y.* 426; *Lafayette Ins. Co. v. Rogers*, 30 *Barb.* 491.

125. Entry on lands means lawful entry. 4 *E. D. Smith*, 248.

126. Indorsed means lawfully indorsed. (*Mechan. Bk. Asso. v. Spring Val. Shot Co.*, 25 *Barb.* 521; *Price v. McClave*, 6 *Duer*, 544; *Bk. of Geneva v. Gulick*, 8 *How. Pr.* 57.) And includes delivery. *Bk. of Lowville v. Edwards*, 11 *How. Pr.* 216.

127. Lease in Writing.—A lease said to be in writing must be taken to be a parol lease. (*Vernam v. Smith*, 15 *N.Y.* 332.) And an agreement for quiet enjoyment is implied from its terms. *Mayor of N. Y. v. Mabie*, 3 *Kern.* 151; *Tone v. Brace*, 11 *Paige*, 566.

128. Negligence.—Negligence includes gross as well as ordinary negligence. *Nolton v. West. R.R. Corp.*, 15 *N.Y.* 450; *Edgerton v. N.Y. and Harl. R.R. Co.*, 35 *Barb.* 389.

129. No Award implies no valid award. *Dresser v. Stansfield*, 14 *M. & W.* 822; and "no memorial," no valid memorial. *Hicks v. Crackwell*, 3 *Id.* 77.

130. Overpayment means an over payment in money. *Mann v. Morewood*, 5 *Sand.* 557.

131. Possession implies legal possession. 23 *Ind.* 548.

132. Signed means made, when applied to a promissory note. *Price v. McClave*, 6 *Duer*, 544; *Bk. of Geneva v. Gulick*, 8 *How Pr.* 57.

133. Subscription to Stock.—That the defendants subscribed to so many shares of stock implies that they were the owners of and entitled to those shares. *Oswego and Syracuse Pl. Rd. Co. v. Rust*, 5 *How. Pr.* 390.

134. Taking means an unlawful taking. *Childs v. Hart*, 7 *Barb.* 372.

135. Writing Obligatory.—The term “writing obligatory” in a pleading imports a stated instrument. *Clark v. Phillips*, *Hempst.* 294.

136. A verified pleading must be construed so as to make all its parts harmonize, if possible, with each other. (*Ryle v. Harrington*, 4 *Abb. Pr.* 421.) And the entire pleading must be considered together. 4 *East.* 502; 5 *Id.* 270; 10 *Id.* 87; *Beach v. Burdell*, 2 *Duer*, 327; *Havens v. Bush*, 2 *Johns.* 387; *King v. Harrison*, 15 *East.* 614; *Hatch v. Peet*, 23 *Barb.* 575; *Page v. Boyd*, 11 *How. Pr.* 415; *Laub v. Buckmiller*, 17 *N.Y.* 622.

137. The averment which bears most strongly against the pleader will be taken as true. (*Bell v. Brown*, 22 *Cal.* 671; *Dickinson v. Maguire*, 9 *Cal.* 46; *Allen v. Patterson*, 3 *Seld.* 480.) But the liberal provisions of the statute, in facilitating amendments to pleadings, have somewhat modified the maxim that pleadings should be construed most strongly against the pleader, as laid down by standard authors; (see 1 *Chitt. Pl.* 237; 1 *Whitt.* 578; 1 *Saund.* 259; 1 *B. & P.* 155; *Co. Litt.* 303; *Steph. Pl.* 378; *Bac. Max. Reg.* iii.) and which, subject to such modification, has been declared as still the rule of construction in *Dickinson v. Maguire*, 9 *Cal.* 46; *Moore v. Besse*, 30 *Cal.* 570;

Kingsley v. Bill, 9 *Mass.* 198; *Doane v. Badger*, 12 *Id.* 69; *Truscott v. Dole*, 7 *How. Pr.* 221; *Radway v. Mather*, 5 *Sand.* 654; *Crocker v. Baker*, 3 *Abb. Pr.* 182; *Levy v. Lay*, 6 *Id.* 90; *Rateau v. Bernard*, 12 *How. Pr.* 464; *Star Steamship Co. v. Mitchell*, 1 *Abb. Pr. (N.S.)* 396; *Butler v. Viele*, 44 *Barb.* 166.

138. It is presumed that every person states his case as favorably to himself as possible. (1 *Chitt. Pl.* 237; *Co. Litt.* 303; *Platt on Cov.* 141; *Pearce v. Champneys*, 4 *Dowl.* 276; *Fuller v. Hampton*, 5 *Conn.* 422; *Halligan v. Chicago and Rock I. R.R. Co.*, 15 *Ill.* 558; *Ware v. Dudley*, 16 *Ala.* 742.) And yet the language of a pleading is to have a reasonable intendment and construction. (1 *Chitt. Pl.* 237; *Com. Dig. Pl. (C.* 25); 1 *Lev.* 190; 5 *East.* 259; 12 *Id.* 263; *Hastings v. Wood*, 13 *Johns.* 482.

139. So, if a pleading has on its face two intendments, it ought to be construed by this rule. (*United States v. Linn*, 1 *How. U. S.* 104; 17 *Pet. U. S.* 88; compare *Kerr v. Force*, 3 *Cranch.* 8.) But where an expression is capable of different meanings, that meaning should be taken which will support the allegation, and not the other which would defeat it. (1 *Chitt.* 237; 4 *Taunt.* 492; 1 *Salk.* 325; 5 *East.* 244, 257; 12 *East.* 279; *Pender v. Dicken*, 27 *Miss. (5 Cush.)* 252.) And when a word has two meanings in law differing in degree merely, it will be understood in its larger sense, unless it appears to be used in its narrower sense. *Miller v. Miller.* 33 *Cal.* 353.

140. Doubtful language is construed most strongly against the pleader. (*Steph. Pl.* 378; 1 *Chitt.* 237;

Moore *v.* Besse, 30 *Cal.* 570; Bates *v.* Rosekrans, 23 *How. Pr.* 98; Beach *v.* Bay State Co., 10 *Abb. Pr.* 71; Allen *v.* Patterson, *supra*; Ridder *v.* Whitlock, 12 *How. Pr.* 208.) Unless confessed to be ambiguous, with a request on the part of the pleader to be allowed to amend. (Nevada and Sacramento Co. Canal Co. *v.* Kidd, 28 *Cal.* 673; Chipman *v.* Emeric, 5 *Cal.* 49; Wright *v.* The "King," 3 *Nev. & Man.* 892.) Where it is doubtful on which the pleader intends to rely, tort or contract, that construction should prevail which is most unfavorable to the pleader. Ridder *v.* Whitlock, 12 *How. Pr.* 212; Munger *v.* Hess, 28 *Barb.* 75.

141. This rule, however, does not require such a construction to be given as will make the pleading absurd. (1 *Chitt.* 237; Marshall *v.* Shafter, 32 *Cal.* 176; Lorraine *v.* Long, 6 *Id.* 452; Sheddon *v.* Patrick, 28 *Eng. Law and Eq. Rep.* 68.) The demand for judgment, and the summons, may in such cases be consulted. Sellar *v.* Sage, 12 *How. Pr.* 531; Dows *v.* Green, 3 *How. Pr.* 377; Spalding *v.* Spalding, *Id.* 297; Rodgers *v.* Rodgers, 11 *Barb.* 596; Chambers *v.* Lewis, 2 *Hilt.* 591; 10 *Abb. Pr.* 206; 11 *Abb. Pr.* 210; Cornes *v.* Harris, 1 *Comst.* 223.

142. Allegations in the present tense in a verified pleading must be deemed as relating to the date of verification. (Prindle *v.* Carruthers, 15 *N.Y.* 426; Fisher *v.* Ford, 12 *Adol. & El.* 654; Faithful *v.* Ashley, 1 *Q. B.* 183; Wheeler *v.* Heermans, 3 *Sand. Ch.* 597; Rice *v.* O'Connor, 10 *Abb. Pr.* 362; Martin *v.* Kanouse, 2 *Abb. Pr.* 329; Dendy *v.* Powell, 3 *M. & W.* 442; Mollann *v.* Torrance, 9 *Wheat.* 537; Warwick *v.* Beswick, 10 *B. & C.* 676; Boyd *v.* Weeks, 2 *Den.* 222.)

If the allegations of a defense are pertinent to the controversy, their sufficiency can only be tested on demurrer or on the trial. *Carpenter v. Bell*, 19 *Abb. Pr.* 258.

143. A general allegation followed by a specific one, is governed by the latter. The latter clause of the sentence explains and restricts the former part; (*Hatch v. Peet*, 23 *Barb.* 584;) and an averment of a legal conclusion at variance with an admitted fact will be disregarded. (*Jones v. Phoenix Bk.*, 4 *Seld.* 235; *Robinson v. Stewart*, 10 *N.Y.* 189.) And such averment without any fact to warrant it, is always disregarded. *Schenk v. Naylor*, 2 *Duer*, 678; *Mann v. Morewood*, 5 *Sand.* 566; *Burrall v. Bowen*, 21 *How. Pr.* 378; *Hentz v. L.I. R.R. Co.*, 13 *Barb.* 657.

IMPLIED ADMISSIONS IN PLEADINGS.

144. A failure to answer is an admission of every issuable fact stated in the complaint, and of those only. (*Harlan v. Smith*, 6 *Cal.* 173; *Hentsch v. Porter*, 10 *Id.* 555; *Rowe v. Table Mt. Wat. Co.*, 10 *Id.* 441; *McGregor v. Shaw*, 11 *Id.* 47; *Hunt v. City of San Francisco*, 11 *Cal.* 250; *Curtis v. Herrick*, 14 *Cal.* 117; *Johnson v. Pierce*, 7 *Eng. (Ark.)* 599; *Gould v. Glass*, 19 *Barb.* 186; *Montgomery Co. Bk. v. Albany City Bk.* 3 *Seld.* 464; *Higgins v. Freeman*, 2 *Duer*, 650; *Budd v. Bingham*, 18 *Barb.* 494.) *But such failure* to answer does not admit anything contained in the answer of a co-defendant. *Woodworth v. Bellows*, 4 *How. Pr.* 24.

WHAT A DEMURRER ADMITS.

145. A demurrer admits the truth of such facts as

are issuable and well pleaded, but not the conclusions drawn therefrom. A demurrer to the answer to a petition for a writ of mandate is an admission of the matters averred in the answer. (*Middleton v. Low*, 30 *Cal.* 596; *Branham v. Mayor of San Jose*, 24 *Cal.* 602.) Whether anything more than the exact allegations of a complaint on demurrer are admitted, see (*Lyon v. City of Brooklyn*, 28 *Barb.* 609.) For further authorities, consult *Demurrer*, Vol. ii.

146. Every material allegation in the complaint, not controverted by the answer thereto, shall for the purpose of the action be taken as true; (*Cal. Pr. Act*, § 65; *Nevada Code, Id.*; *Idaho, Id.*; *Arizona, Id.*; *N.Y. Code*, § 268; 1 *Van Santv.* 759; *Patterson v. Ely*, 19 *Cal.* 28; *Seale v. Emerson*, 25 *Id.* 293; *Landers v. Bolton*, 26 *Id.* 393; *Surget v. Byers, Hempst.* 715); as the failure to deny is an admission of the truth of such allegations, and such admission is conclusive. (*Blankman v. Vallejo*, 15 *Cal.* 638; *Burke v. Table Mt. W. Co.*, 12 *Id.* 403; *Whitehall v. Thomas*, 9 *Id.* 499; *Crosby v. Leary*, 6 *Bosw.* 312.) So when the answer contains a cross complaint, the matters therein alleged will be taken as confessed, if not replied to. *Herald v. Smith*, 34 *Cal.* 125.

147. But immaterial allegations require no denial, and are not admitted by such failure to deny them. (*Canfield v. Tobias*, 21 *Cal.* 349; *Oechs v. Cook*, 3 *Duer*, 161.) Nor averments of mere evidence. (*Racouillat v. René*, 32 *Cal.* 450.) Nor matters in avoidance, which shall on the trial be deemed controverted by the adverse party without any specific denial. (*Cal. Pr. Act*, § 65.) As a plea of infancy; (*Hodges v. Hunt*,

22 *Barb.* 150;) or the Statute of Limitations. *Esseltyn v. Weeks*, 2 *E. D. Smith*, 116; 2 *Kern.* 635; see, also, *Cutler v. Wright*, 22 *N.Y.* 472; *McKenzie v. Farrell*, 4 *Bosw.* 193.

148. If a complaint is sworn to, a general denial in the answer thereto admits all the material allegations thereof: the denial should be specific. (*Pico v. Colimas*, 32 *Cal.* 578; *Landers v. Bolton*, 26 *Cal.* 393.) And where the admissions in the answer negative its general denials, the latter may be disregarded. *Fremont v. Seals*, 18 *Cal.* 433.

149. A specific denial of one or more allegations is an admission of all others well pleaded. (*De Ro v. Cordes*, 4 *Cal.* 117.) So, also, a denial of value alleged is an admission of any value less than the amount alleged. *Towdy v. Ellis*, 22 *Cal.* 651.

150. Literal and conjunctive denials are bad. Where allegations are compound, and are denied as a whole in the exact language of the complaint, the allegation will be deemed admitted. *Blood v. Light*, 31 *Cal.* 115; *Fish v. Reddington*, *Id.* 185; *Reed v. Calderwood*, 32 *Id.* 109; *Fitch v. Bunch*, 30 *Id.* 208; *Woodworth v. Knowlton*, 22 *Cal.* 164; *Blankman v. Vallejo*, 15 *Cal.* 638; *Smith v. Richmond*, *Id.* 501; *Caulfield v. Sanders*, 17 *Cal.* 569; *Kuhland v. Sedgwick*, *Id.* 123; *More v. Del Valle*, 28 *Cal.* 170.

BY WANT OF VERIFICATION.

151. If the answer be not verified, the genuineness and due execution of the written instrument, of which complaint contains a copy, shall be deemed admitted.

(*Cal. Pr. Act*, § 53; *Horn v. Volcano Wat. Co.*, 13 *Cal.* 62; *Kinney v. Osborne*, 14 *Cal.* 112.) Or of a bond, (*Sacramento Co. v. Bird*, 31 *Cal.* 66; *Burnett v. Stearns*, 33 *Cal.* 468.) This is confined to those who are alleged to have "*signed*" the instrument. An administrator need not deny the signature of the intestate under oath. *Heath v. Lent*, 1 *Cal.* 411.

152. Even if the complaint be not verified, this rule obtains, since the written instrument would be admissible in evidence without proof of the genuineness of the signature. (*Corcoran v. Doll*, 32 *Id.* 83; *Burnett v. Stearns*, 33 *Cal.* 468.) The terms of promise, and the kind of money in which payment is to be made, are to be ascertained from an inspection and construction of the written instrument. *Burnett v. Stearns*, 33 *Cal.* 468.

153. When the defense to an action is founded on a written instrument embodied in the answer, the genuineness and due execution of the instrument shall be deemed admitted, unless an affidavit be filed denying the same. (*Cal. Pr. Act*, § 54.) But *the due execution of the instrument* shall not be deemed admitted, unless the party controverting the same is upon demand permitted to inspect the original. *Cal. Pr. Act*, § 54.

154. *A paper attached* to a complaint as an exhibit, purporting to be an admission of agency, is not an admission, if the answer denies the agency. (*Garfield v. Knights Ferry and Tab. Mt. Wat. Co.*, 14 *Cal.* 37.) Exhibits attached to an answer need no further verification, than what arises from the averments in the

answer, that they are copies. *Ely v. Frisbie*, 17 *Cal.* 250.

EFFECT OF ADMISSIONS.

155. No proof is required of facts admitted or not denied. (*Tuolumne Redemption Co. v. Patterson*, 18 *Cal.* 415; *Jungerman v. Bovee*, 19 *Id.* 354; *Dimick v. Campbell*, 31 *Cal.* 238; *Patterson v. Ely*, 19 *Cal.* 28; *Landers v. Bolton*, 26 *Cal.* 416; *Parkhurst v. McGraw*, 24 *Miss. R.* 134; *Hackett v. Richards*, 11 *N.Y. Leg. Obs.* 315; *Ward v. The "Fashion,"* 1 *Newb.* 8; *S.C. 6 McLean*, 152.) Except for an amount of unliquidated damages. *Stuart v. Binsse*, 10 *Bosw.* 436.

156. On such *admissions*, the *onus* of proving his affirmative allegations will be thrown on the defendant. (*Thompson v. Lee*, 8 *Cal.* 275.) And admission in the answer that defendant received money to plaintiff's use and refused to pay the same on demand, does not preclude evidence of payment if payment is set up in the answer. (*McDermot v. Davidson*, 30 *Cal.* 174.) But an admission in one plea does not operate as an admission in respect to an issue presented in another. (*Fowler v. Davenport*, 21 *Tex.* 626.) Where there are several defenses in an answer, an admission made in one is not an admission for all the purposes of the case. It does not destroy the effect of a denial of the matter thus admitted in another answer. *Siter v. Jewett*, 33 *Cal.* 92.

157. When an ultimate fact is admitted, probative facts tending to establish, modify, or overcome it will not be considered. (*Mulford v. Estudillo*, 32 *Cal.*

131.) So, an admission of indebtedness implies a promise to pay. *Levinson v. Schwartz*, 22 *Cal.* 229.

VARIANCE OR DEFECTS.

158. An error or defect that does not affect a substantial right shall not be regarded. (*Cal. Pr. Act*, § 71; *N.Y. Code*, § 176; *Nevada*, § 71; *Idaho*, § 71; *Arizona*, § 71.) This section is a most beneficial provision of the Practice Act, and should be liberally construed. (*Regan v. O'Reilly*, 32 *Cal.* 11.) And a disregard of a variance may be held equivalent to an amendment at the trial. *Miller v. Hull*, 5 *Cal.* 245; *Coleman v. Playstead*, 36 *Barb.* 26.

159. The complaint must agree with the summons in the description of the parties. (*Blanchard v. Strait*, 8 *How. Pr.* 83; *Tuttle v. Smith*, 6 *Abb. Pr.* 336; *Elliott v. Hart*, 7 *How. Pr.* 25; *Allen v. Allen*, 14 *How. Pr.* 248.) It was held in New Hampshire that the description of the defendants as partners under a particular name or firm in the writ, is not an averment that they promised by that name. Proof of the promise by another name is therefore not a variance. *Brown v. Jewett*, 18 *N.H.* 230.

160. It was held in New York, that a complaint setting forth a conversion by the defendant, of money deposited with him, and demanding the amount of such money, is not a variance from a summons for a money demand on contract. *Goff v. Edgerton*, 18 *Abb. Pr.* 381.

161. So it has been held, by the Supreme Court of the United States, that a variance between pleadings

and findings will not be regarded where there is no allegation that the findings were unwarranted by the proofs. *Railroad Comp. v. Lindsay*, 4 *Wall. U. S.* 650.

PLEADINGS AND PROOF.

162. *Allegata* and *probata* must correspond, and plaintiff must in general prove his case as alleged in the complaint. (*Gould's Pl.* 160; 19 *Johns.* 66; *Stout v. Coffin*, 28 *Cal.* 65.) But a variance between the pleadings and proof, if it be not a material variance, that is one which has actually misled the adverse party to his prejudice, shall not be regarded. *Began v. O'Reilly*, 32 *Id.* 11; *Plate v. Vega*, 31 *Id.* 383; *Crawford v. The "William Penn,"* 3 *Wash.* 484; *Bate v. Graham*, 1 *Kern.* 257; *Lettman v. Ritz*, 3 *Sand.* 734; *Cotheal v. Talmadge*, 1 *Smith's Com. Pl. R.* 574; *Catlin v. Gunter*, 10 *How. Pr.* 316; see 19 *Wend.* 542; *Cow. & Hill's Not.* 531.

163. Where the allegations in a pleading to which the proof is directed remain unproved in its entire scope and meaning, it is not a case of variance to be disregarded, and an amendment will not be allowed unless it clearly appear to be in furtherance of justice to allow it. (*Roth v. Schloss*, 6 *Barb.* 308; *Egert v. Wicker*, 10 *How. Pr.* 193; *Catlin v. Hanson*, 1 *Duer*, 309.) If evidence is offered by the plaintiff at variance with the allegations of the complaint, and the counsel for the defense does not object to it at the time, nor move to strike it out upon the ground of variance, this error is waived. *Boyce v. California Stage Co.*, 25 *Cal.* 471.

164. In an action against a common carrier for not

complying with a contract to carry or deliver a draft, the complaint alleged that it was signed, "John Q. Jackson;" the proof showed that it was signed, "John Q. Jackson, Agent." *Held*, that the variance was immaterial. *Zeigler v. Wells*, 28 *Cal.* 263.

165. Consideration.—It is not a variance, if, upon the consideration stated in the count, it is proved that the defendant undertook to do an act in addition to that, the non-performance of which is stated in the count. (*Morrill v. Richey*, 18 *N.H.* 295.) A written agreement in this form: "Borrowed and received of A., two hundred and sixty dollars, which I promise to pay on demand, with interest;" imports a consideration on its face; and if the defendant in an action upon it, has introduced evidence tending to show that it was given without consideration, the plaintiff may prove that it was given in payment of a debt of a third person, although there is no averment to that effect in the declaration. (*Plate v. Vega*, 31 *Cal.* 383; *Cochran v. Duty*, 8 *Allen (Mass.)* 324.) A complaint alleged that the consideration of a contract was five thousand five hundred dollars; the proof was that the consideration was a sight draft, which was paid. *Held*, no variance. *Nash v. Towne*, 5 *Wall. U.S.* 689.

166. Covenant.—Plaintiffs will not be allowed to recover upon an implied covenant in a lease, totally different from the express covenant declared on, when objection is specifically made, though not taken until the evidence is all in. *Merritt v. Closson*, 36 *Vt.* 172.

167. Dates.—So, when dates are in question, unless they be the gist of the action, a variance will be immaterial. (*Zorkowski v. Zorkowski*, 3 *Robertson*, 613; *United States v. LeBaron*, 4 *Wall. U.S.* 642.) When a contract is alleged to have been made on a certain day, it is no variance to offer in evidence a written contract which took effect on a different day. (*Id.*) Time stated in a pleading is often not material, and may be departed from in evidence. (*Andrews v. Chadbourne*, 19 *Barb.* 147; but compare *Walden v. Crafts*, 2 *Abb. Pr.* 301; see, also, *People ex rel. Crane v. Ryder*, 2 *Kern.* 433.) An averment in the plaintiff's statement, that notice of non-payment was given at a wrong date, is but a defect in form, and the subject of amendment. It is not necessary to aver the precise date when the notice was given. And the averment in the statement not being

inconsistent with the fact that another notice was given at the proper time, if the parties go to trial on the merits, on the pleas of payment and payment with leave, etc., judgment will not be arrested on the ground of the insufficiency of the statement of notice of non-payment. *Loose v. Loose*, 36 *Penn.* 538.

168. Deceit.—A declaration in action of tort, which alleges that the plaintiff through his agent procured the defendants to furnish and deliver to him a certain article, and that they negligently and carelessly furnished a different article, and that he sustained an injury by the use of the article furnished, believing it to be that which he ordered, is not sustained by proof that the plaintiff bought the article of a third person who obtained it of the defendants. *Davidson v. Nichols*, 8 *Allen (Mass.)* 75.

169. Description.—So in a case where the proof, among other things, showed such lands to extend a certain distance from the northeastly instead of the northwesterly corner of the tract, as alleged in the complaint. The judgment followed the description in the complaint. Defendant appeals. *Held*, that the variance in the description of the premises did not prejudice appellant; that the question was one of *identity*, and the fact that the corner of the small tract was called the northeasterly instead of the northwesterly corner was *itself* insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul v. Silver*, 16 *Cal.* 75.

170. Joint Liability.—Although the proof may show a joint liability of the defendant with another, and thus may constitute a variance, yet if the objection is not taken in the mode pointed out by the Code, it is one which the defendants shall be deemed to have waived. (*Lee v. Wilkes*, 27 *How. Pr.* 336.) An action against two or more for a joint trespass cannot be sustained by evidence of acts committed by one of them. *Davis v. Cassell*, 50 *Maine*, 294.

171. Nuisance.—A declaration charging that the defendant *dug*, opened, and *made*, is sustained by proof that he formed it partially by excavation and partially by raising walls. *Robbins v. Chicago City*, 4 *Wallace U.S.* 657.

172. Promise.—If the declaration alleges a single promise for the performance of two different things, founded upon an entire consid-

eration, and the evidence shows two promises, at different times, upon distinct considerations, that is a fatal variance. *Hart v. Chesley*, 18 *N.H.* 373.

173. Promissory Note.—It is held in Massachusetts, that a declaration upon an agreement to discharge the plaintiff from all liabilities, on account of certain purchases, as one of a firm recently dissolved, which alleges that a certain note was due from the firm at the time when the agreement was made, is not sustained by proof that such a note was afterwards given for a liability of the firm; but an amendment would be allowed on terms. *Nichols v. Prince*, 8 *Allen (Mass.)* 404.

174. Relief.—The complaint should agree with the summons as to the amount claimed. (*Johnson v. Paul*, 14 *How. Pr.* 454.) A departure of the complaint from the summons in respect to the form of relief, is not grounds for reversing the judgment on appeal. If necessary to sustain the judgment, the summons may be amended on appeal from the judgment, so as to conform to the fact proved. (*Willet v. Stewart*, 43 *Barb.* 98.) But in most states it seems an appearance waives all errors of service or form of summons.

175. Statement of Cause of Action.—The complaint must agree with the summons in the statement of the cause of action. (*Ridder v. Whitlock*, 12 *How. Pr.* 208; *Boington v. Lapham*, 14 *Id.* 360; *Johnson v. Paul*, 14 *Id.* 454; *Tuttle v. Smith*, 6 *Abb. Pr.* 330; 14 *How. Pr.* 395; *Shafer v. Humphrey*, 15 *How. Pr.* 564; *Davis v. Bates*, 6 *Abb. Pr.* 15; *Campbell v. Wright*, 21 *How. Pr.* 13.) But if the complaint set forth a substantial cause of action, and the defect be one that was amendable, it is cured by verdict. (*Robinson v. English*, 34 *Penn.* 324; *Garland v. Davis*, 4 *How. U.S.* 131.) If the cause of action or defense be substantially proved, the failure to prove certain allegations precisely as laid is an immaterial variance which will be totally disregarded. *Union India Rubber Co. v. Tomlinson*, 1 *Smith Com. Pl. R.* 364; *Lettman v. Ritz*, 3 *Sand.* 784.

CHAPTER II.

FORMAL PARTS OF PLEADINGS.

1. The formal parts of pleadings consist of the caption, commencement, prayer, verification, and subscription. The caption consists of, *First*, The name of the state and county in which the action is brought. *Second*, The name of the court, and, *Third*, The names of the parties, plaintiff and defendant. (1 *Chitt. Pl.* 261, 527, 528; 1 *Arch.* 72, 168; *Steph. Pl.* 440; *Topping v. Fuge*, 1 *Marsh.* 341.) In the forms throughout this work, the caption will be indicated by the word "*Title*," which will be understood to include both the venue of the action and the names of the parties.

FORMAL PARTS OF COMPLAINT.

No. 1.

i. *Title of Cause.*

State of California,	}	In the District Court, Judicial District.
City and County of		

ANDREW BLACK, Plaintiff,	}
<i>against</i>	
CHARLES DEAN, Defendant.	

2. The first subdivision of the complaint is an essential part thereof, and constitutes the title of the action. This embraces the name of the *state* and *county* or venue of the action, the name of the *court* in which the action is to be tried, and the names of the

parties to the action. (See *Cal Pr. Act*, §39; 4 *Comst.* 253.) An omission to state either of these is an irregularity (1 *Van Santv.* 203), which may cause the complaint to be set aside or action dismissed on motion. *Williams v. Wilkinson*, 1 *Code R.* 20.

3. County.—Naming the county in the title of the cause, as above, is a sufficient designation of the county in which the plaintiff desires the trial to be had. 1 *Chitt. Pl.* 266; *Swans. Pl.* 141; *Williams Pl.* 97; *Tidd's. Pr.* 434; *Steph. Pl.* 280; *Tappan v. Powers*, 2 *Hall*, 277; *Slate v. Post*, 9 *Johns.* 81; *Barnes*, 483; 3 *T. R.* 387; *Clapp v. Gelman*, 2 *Blackf.* 45; *Davison v. Powell*, 13 *How. Pr.* 287; *King v. Burdett*, 4 *Barn. and Ald.* 175; *Calvin's Case*, 7 *Rep.* 1; *Scott v. Brest*, 2 *T. R.* 238; *McKenna v. Fisk*, 1 *How. U.S.* 211.

4. Court.—Every complaint shall be entitled in the proper court. (*Cal. Pr. Act*, § 39; see Codes of Oregon, Nevada and Arizona, 1 *Chitt.* 263; *Tidd's Pr.* 43; 1 *Van Santv.* 202; *Kippling v. Watts*, *Leg. Obs.* 86.) If a suit be brought in a local court, the full title of the court should be given: e.g., "The City Court of Brooklyn." But where the summons and complaint are served together, its omission from the complaint is a technical irregularity which cannot injure the defendant. (See *Van Namee v. Peoble*, 9 *How. Pr.* 198; cited in *Van Benthuyzen v. Stevens*, 14 *Id.* 70.) But if neither the summons nor complaint names any court, no cognizance of the action need be taken. (*Ward v. Stringham*, 1 *Code R.* 118.) The above authorities have special reference to the New York practice, which in service of summons and commencement of actions differs from our own. It is nevertheless authority upon the general propositions. So, in the New York practice, if the name of the court be in the summons, the court will disregard the omission in the complaint; (*Van Namee v. Peoble*, 9 *How. Pr.* 198; *Yates v. Blodgett*, 8 *How. Pr.* 278; *Merrill v. Grinnell*, 10 *Id.* 32; *Van Benthuyzen v. Stevens*, 14 *Id.* 70;) and may permit an amendment even after answer.

5. Name.—The law knows only one christian name, and all intervening initials are no part of the name. (*People v. Cook*, 14 *Barb.* 261; *Smith v. Ross*, 7 *Mo.* 463; *Orme v. Shephard*, *Id.* 606; overruling *King v. Clark*, *Id.* 269, on this subject.) That the law recognizes but one christian name was held in the late case of (*Garwood v. Hast-*

ings, *Cal. Sup. Ct., July T., 1869.*) It seems that the word "Junior" is no part of a name. (*People v. Cook*, 14 *Barb.* 261.) Nor the word "Senior." These are mere unnecessary additions, and should not be inserted in the complaint. (*Neil v. Dillon*, 3 *Mo.* 59.) Yet we do not see why the terms "Junior" or "Senior" may not be properly used in a complaint, for the purpose of more clearly identifying the person;

6. Name, Mistake in.—Though the names of the parties must be correctly stated, yet a mistake in the name even of the plaintiff is not fatal, but may be corrected at any time. (*Barnes v. Perine*, 9 *Barb.* 202; *Bk. of Havana v. Magee*, 20 *N.Y.* 356; *Walker v. Perkins* 9 *Jur.* 665; 14 *Law Jour. Rep.* 214; 1 *New. Pr. Cas.* 199.) The objection to a misnomer may be raised at any time; (*Elliot v. Hart*, 7 *How. Pr.* 25; cited in *Dole v. Manley*, 11 *How. Pr.* 138; *Farnham v. Hildreth*, 32 *Barb.* 277;) and plaintiff may be allowed to correct. *Waterbury Manfg. Co. v. Krause*, 1 *Hill.* 560; *Follower v. Laughlin*, 12 *Abb. Pr.* 105.

7. Parties.—The caption shall contain the names of all the parties, plaintiff and defendant. (*Cal. Pr. Act*, § 39; *N.Y. Code*, § 142; *Oregon Code*, § 65; *Nevada*, § 39; *Arizona, Id.*) The rule is that the names of the parties must be fully set forth and be properly designated, the complaining party as plaintiff, and the adverse party as defendant. (*Cal. Pr. Act*, § 2; *N.Y. Code*, § 70; and see *Codes of Oregon, Idaho, Nevada, Arizona*, etc.

8. Parties Joined.—Properly the names of all the parties plaintiff and defendant should be set forth in the title. If, however, some are named in the title, and all are correctly named in the body of the complaint, it will be sufficient. (*Hill v. Thacter*, 2 *Code R.* 3; 3 *How. Pr.* 407.) But being once stated, it is sufficient afterward to designate them as "the plaintiff" and "the defendant." (*Davison v. Savage*, 6 *Taunt.* 121; *Stephenson v. Hunter, Id.* 406; *Stanley v. Chappell*, 8 *How. Pr.* 235.) And this rule applies when plaintiff sues in an official character. (*Stanley v. Chappell*, 8 *How. Pr.* 235; *Ketchum v. Morrell*, 2 *N.Y. Leg. Obs.* 58; but compare *Christopher v. Stockholm*, 5 *Wend.* 36. And if they sue in an official capacity, it is usual and proper that their character should be indicated. *Hill v. Thacter*, 2 *Code R.* 3; 3 *How. Pr.* 407.

9. Place of Trial.—The complaint is irregular unless it states the places of trial. (1 *Van Santv.* 203; *Williams v. Wilkinson*, 1

Code, R. (N.S.) 20; *Hall v. Huntley, Id.* 21.) And in such case it must be amended or stricken out. (*Merrill v. Grinnell, 10 How. Pr.* 31; *Hotchkiss v. Crocker, 15 Id.* 336; *Davison v. Powell, 13 How. Pr.* 288.) It cannot be cured by reference to the summons. (*Id.*; *McKenna v. Fisk, 1 How. U.S.* 211.) It may be amended, but only on payment of defendant's costs. (*Hall v. Huntley, 1 Code R.* 21.) These authorities apply more particularly to the practice in New York, though they are applicable here.

10. Real Party.—The complaint shall contain the name of the real party in interest. (*Cal. Pr. Act, § 4*; *1 Van Santv. Eq. Pr.* 72; see *Ante*, Parties, p. 53.) The term "parties" includes all who are directly interested in the subject matter of the action, having a right to make defense, control proceedings, examine and cross-examine witnesses, and appeal from the judgment. (*Robbins v. Chicago City, 4 Wallace U. S.* 567.) For a further definition, see *Girard v. Stagg, 4 E. D. Smith, 27.*

11. Titles to be Avoided.—In designating the parties to the action, except where suit is brought in an official or representative capacity, no title or other appellation is necessary. If inserted, it will be treated as mere surplusage. *Shelden v. Hoy, 11 How. Pr.* 15; *Merritt v. Seaman, 2 Seld.* 168; *Bogert v. Vermilyea, 10 N.Y.* 447; *Root v. Price, 22 How. Pr.* 372; *Butterfield v. Macomber, Id.* 150; *Forrest v. Mayor of N.Y., 13 Abb. Pr.* 350; *Scranton v. Farmers' Bk. of Rochester, 33 Barb.* 527; *Hallett v. Harrower, Id.* 537.

12. Venue, how Laid.—As a venue is technically necessary to every traversable fact, when it is once properly laid, all matters following refer to it. (*Cocke v. Kendall, Hempst.* 236.) It has been held, however, that a venue laid in the body of the complaint is sufficient. (*Dwight v. Wing, 2 McLean, 580.*) The proper mode in all cases will be to lay the venue in the title.

No. 2.

ii. *Title of Cause where some of the Parties are Unknown.*

[STATE AND COUNTY.]

[COURT.]

ANDREW BLACK, Plaintiff. <i>against</i> CHARLES DEAN, JOHN DOE AND RICHARD ROE, Defendants.	}
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13. Parties Known and Unknown.—In certain cases the statute authorizes the plaintiff to proceed against parties, some of whom are known and others unknown, giving the true names of such as are known, and designating the others by fictitious names, stating in the body of the complaint the reason, that “their true names are unknown.”

14. Parties Unknown.—If the plaintiff should be ignorant of the name of the adverse party, he may designate him by any name, and amend, of course, at any stage of the proceedings when his true name shall become known. (*Cal. Pr. Act*, § 69; *N.Y. Code*, § 175; *Morgan v. Thrift*, 2 *Cal.* 562; *Crandall v. Beach*, 7 *How. Pr.* 271; but see *McNally v. Mott*, 3 *Cal.* 235; *Sutter v. Cox*, 6 *Cal.* 415; *Pindar v. Black*, 4 *How. Pr.* 95.) But the plaintiff cannot thus use a fictitious name at his discretion; he is restricted to cases where the name of the adverse party is unknown; (*Crandall v. Beach*, 7 *How. Pr.* 271;) and must aver in the pleading that the true name of the party is to the plaintiff unknown. (*Waterbury v. Mather*, 16 *Wend.* 611.) Where a defendant is sued as James ———, service was returned upon John ———, and judgment was entered against J. ———. *Held* to be error, unless there was something in the record to show that the person served was the person sued. *Sutter v. Cox*, 6 *Cal.* 415.

No. 3.

iii. Title of Cause.—Corporations.

[STATE AND COUNTY.]

[COURT.]

THE MONO GOLD AND SILVER MINING COMPANY, Plaintiff, <i>against</i> THE FORT TEJON RAILROAD COMPANY, Defendant.	}
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15. Corporations.—A corporation cannot sue otherwise than by its corporate name. (*Curtis v. Murray*, 26 *Cal.* 633; *Crawford v. Collins*, 30 *How. Pr.* 398.) And a company by its firm name or title. (*King v. Randlett*, 33 *Cal.* 318.) In New York, a banking association may sue either in its corporate name or in the name of its president. (*Leonardsville Bank v. Willard*, 25 *N.Y.* 574.) This does not,

however, take the place of the averments necessary in the body of the complaint, showing their official character.

16. Person.—The word “person” in its legal signification is a generic term, and intended to include artificial as well as natural persons; (*Douglass v. Pacific M. S. S. Co.*, 4 *Cal.* 304;) the statute having done away with all distinction between natural and artificial persons, and the rules of pleading applicable thereto. *San Francisco Gas Co. v. The City of San Francisco*, 9 *Cal.* 467.

No. 4.

iv. *Title of Cause.*—*By an Officer.*

[STATE AND COUNTY.]

[COURT.]

ANDREW BLACK, COMPTROLLER OF THE STATE OF CALIFORNIA, Plaintiff, <i>against</i> CHARLES DEAN, Defendant.	}
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17. Name of Officer.—The action should be brought in the name of the officer, with the title of his office annexed. *Paige v. Fazackerly*, 36 *Barb.* 392.

No. 5.

Title and Commencement.

State of California, City and County of	}	In the District Court of the . . . Judicial District.
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ANDREW BLACK, Plaintiff, <i>against</i> CHARLES DEAN, Defendant.	}
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The plaintiff complains of the defendant, and alleges:

18. Commencement.—The commencement of pleadings consists of those formal words or expressions used to introduce the subject matter.

*No. 6.**Commencement.—By one Suing for himself and others.*

The plaintiff, complains on behalf of himself and of all others [judgment-creditors of the defendant] who shall in due time come in and seek relief by, and contribute to the expenses of this action, and alleges:

*No. 7.**Conclusion of Complaint.*

Wherefore the plaintiff demands judgment, etc.

E. F.,

Attorney for Plaintiffs.[*Verification.*]

19. Conclusion.—The conclusion varies according to the character of the document to which it is affixed. In a complaint, it consists of the prayer for relief, signature of counsel, and verification; while in an affidavit, the signature and *jurat* only are required. Where two attorneys, partners, subscribe a pleading, they may sign in their firm name. (*Bank of Geneva v. Rice*, 12 *Wend.* 424.) And the subscription to the verification of a pleading is a sufficient subscription of the pleading. (*Hubbell v. Livingston*, 1 *Code R.* 63.) The Practice Act provides that every pleading shall be subscribed by the party or his attorney. (*Cal. Pr. Act*, § 51; *N.Y. Code*, § 156.) But an attorney in fact, who is not an attorney at law, cannot sign his name to the complaint for his principal as “plaintiff’s attorney.” *Dixey v. Pollock*, 8 *Cal.* 570.

*No. 8.**Form of Complaint, complete.*

State of California,	}	In the District Court,
City and County of Judicial District.

ANDREW BLACK, Plaintiff,	}
<i>against</i>	
CHARLES DEAN, Defendant.	

The plaintiff complains of the defendant, and alleges:

First : For a first cause of action:

- I. That, etc.
- II. That, etc.
- III. That, etc.

Second : For a second of action:

- I. That, etc.
- II. That, etc.
- III. That, etc.

Wherefore the plaintiff demands judgment, etc.

E. F.,

Plaintiff's Attorney.

[*Verification.*]

*No. 9.**Clerk's Certificate to Copy of Complaint.*

I hereby certify the foregoing to be a full, true and correct copy of the original complaint on file in my office, in the above-entitled action.

In witness whereof, I have hereunto set my hand

and affixed the seal of the above-named court, this
 day of 187..

A. C.,
Clerk.

By J. S.,
Deputy Clerk.

No. 10.

Amendment Complaint—Commencement.

[TITLE OF CAUSE.]

Plaintiff by leave of the Court [*or by stipulation*]
 files this, his amended complaint, and alleges:

[*State cause of action as before.*]

FORMAL PARTS OF DEFENDANT'S PLEADINGS.

No. 11.

Demurrer—Commencement.

[TITLE.]

The defendant demurs to the complaint [*or to the first alleged cause of action in the complaint*] filed herein, and for cause of demurrer alleges:

I. That, etc.

II. That, etc.

20. Grounds of Demurrer.—The defendant may state as many grounds or causes of demurrer as may be apparent on the face of the complaint. But each cause or ground should be distinctly alleged, and be numbered in the margin as above, and if the demurrer is sustained, plaintiff may obtain leave of court, to file an amended complaint, which will take the place of the original complaint in the action.

*No. 12.**Answer.*

The defendant, by G. H. his attorney, answers the complaint herein, and,

First, For a first defense to the first alleged cause of action, denies:

I. That, etc.

Second, For a second defense to said first alleged cause of action, defendant alleges:

I. That, etc.

Third, For a third defense to said first alleged cause of action, defendant alleges:

[*Set forth facts constituting the defense, and if any of them have been alleged above, an express reference to them will suffice.*]

Fourth, And for a counter claim to the second alleged cause of action, defendant alleges:

I. That, etc.

Wherefore defendant demands, etc. [*stating demand on counter claim.*]

G. H.,
Attorney for Defendant.

[*Verification.*]

21. By J. M., his Attorney.—This may be omitted where he has served a notice of appearance; and where two attorneys are partners the firm name will suffice. *Bank of Geneva v. Rice*, 12 *Wend.* 424.

22. Demand of Relief.—No demand for relief is necessary, unless the defendant seeks some affirmative relief against the plaintiff or against a co-defendant. *Averill v. Taylor*, 5 *How. Pr.* 476.

23. Denials of Several Allegations are but one defense. (Otis *v.* Ross, 8 *How. Pr.* 193; 11 *N.Y. Leg. Obs.* 343.) So, several demands against the plaintiff available as a set off may be pleaded in one defense. Each must, however, be distinctly described. Ramney *v.* Smith, 6 *How. Pr.* 420.

24. Distinct Defenses.—Each defense in an answer which is declared to be a *distinct defense*, must be complete in itself, and must contain all that is necessary to answer the whole cause of action or that part which it professes to answer, either by express allegation or by an express reference to other parts of the answer. (Loosey *v.* Orser, 4 *Bosw.* 391; Ayres *v.* Covill, 18 *Barb.* 260.) Though a partial defense must be pleaded, and may be pleaded as a separate defense. Loosey *v.* Orser, 4 *Bosw.* 391.

25. First Alleged Cause of Action.—If the complaint contains more than one cause of action, the answer should indicate to which cause of action each defense is interposed. (Kneedler *v.* Sternbergh, 10 *How. Pr.* 67.) But if the substance of the defense shows to which cause of action it is addressed, it is sufficient on demurrer. Willis *v.* Taggard, 6 *How. Pr.* 433.

26. For a First Defense.—Where a number of defenses are pleaded in one answer, they must be separately stated and plainly enumerated, and the denials should be distinctly and specifically stated.

27. For a Second Defense.—There is but one safe rule in stating actions or defenses, and that is to indicate distinctly, *by fit and appropriate words*, where it commences and where it concludes. (Lippencott *v.* Goodwin, 8 *How. Pr.* 242; see Benedict *v.* Seymour, 6 *Id.* 298.) But no formal commencement or conclusion is prescribed. Bridge *v.* Payson, 4 *Sandf.* 210.

28. Subscription.—The signature of counsel must be attached to an answer in chancery. Davis *v.* Davidson, 4 *McLean*, 136.

29. Verification.—A verified answer is defective if neither the answer nor the verification are subscribed. (Laimbeer *v.* Allen, 2 *Sandf.* 648; 2 *Code R.* 15.) The subscription of the verification is, however, sufficient. (Hubbell *v.* Livingston, 1 *Id.* 63.) An answer in chancery which does not show the authority of the justice of the peace before

whom it was sworn, is not sufficiently certified. (*Addison v. Duckett*, 1 *Cranch. C. Ct.* 349.) If the complaint is verified, the answer must be also verified.

No. 13.

i. Commencement of Answer—Defendant sued by a wrong name.

Defendant, C. D., in the summons and complaint in this action called L. M., answers the complaint herein, and alleges [*or denies*]:

No. 14.

ii. By an Infant.

Defendant, an infant under the age of . . . years, by N. O. his guardian, answers the complaint herein, and alleges [*or denies*]:

No. 15.

iii. By an Insane Person.

Defendant, Q. R., an insane person, [*or a person of unsound mind, or an idiot,*] by S. T. his guardian, answers the complaint herein, and alleges [*or denies*]:

No. 16.

iv. By Husband and Wife.

[TITLE.]

A. X., one of the above named defendants, and B. X. his wife, for answer to the complaint in this action allege [*or deny*]:

30. Construction.—The above must not be understood as an allegation that the parties *are* husband and wife.

No. 17.

v. *Separate Answer of Defendant.*

[TITLE.]

The defendant, A. B., answers on his own behalf the complaint herein, and alleges [*or denies*]:

FORMS OF PETITIONS.

31. Petitions to the Court or to a judge of any court, and affidavits taken when there is no proceeding pending, should not be entitled. *Haight v. Turner*, 2 *Johns.* 371; *People v. Tioga*, 1 *Wend.* 291; *People v. Dikeman*, 7 *How. Pr.* 124; compare *Whitney v. Warner*, 2 *Cow.* 499; *Nichols v. Cowles*, 3 *Id.* 345; *Folger v. Hoogland*, 5 *Johns.* 235; *Matter of Bronson*, 12 *Id.* 460.

No. 18.

Petition to the Court.

To the Honorable, the District Court of the
Judicial District of the State of California [*or
other court, with full designation*].

The petition of, of the City of,
shows:

No. 19.

Petition to a Judge.

To the Honorable, Judge of the District
Court of the Judicial District, of the
State of California [*or other magistrate, giving
full official designation*].

The petition of, etc.

PAPERS USED IN COURT PROCEEDINGS.

32. The caption of certain papers used in a proceeding in the Probate Court may be as follows:

No. 20.

Caption of Papers used in proceedings in Probate Courts.

In the Matter of the Estate of John Doe, deceased.	} Probate Court, County of
The petition of, etc.	

No. 21.

Of Papers used in other Courts.

JOHN DOE, Plaintiff, <i>against</i> RICHARD ROE, Defendant,	} County Court County.

No. 22.

Order of a Court in an Action.

At a regular term of the District Court of the
Judicial District, State of California, held at the City
Hall in the City and County of San Francisco, etc.
Present, the Honorable Judge.

*No. 23.**Caption, Commencement, and Conclusion of Affidavits.*

State of California,	}	In the District Court
City and County of Judicial District.

<hr/> JOHN DOE, Plaintiff, <i>against</i> RICHARD ROE, Defendant. <hr/>	}	Affidavit for

State of California,	}	ss.
County of		

John Doe, of, [*and if there are two deponents, and James Doe, of, severally,*] being duly sworn, say [each for himself]:

1. I am the plaintiff [*or other description of the deponent*].

2. I have, etc. [*State facts sworn to.*]

Subscribed and sworn to	}
before me this day	
of, 187..	

E. F.,
Notary Public.

[SEAL.]

33. Affidavit.—It is entirely useless in the affidavit to a pleading to insert the words, “except as to those matters stated on information and belief, and as to those matters he believes it to be true,” unless the pleading contain some averment on information and belief.

34. Before whom Taken.—Affidavits to be used before any court, judge, or officer of the State (California), may be taken before any judge or clerk of any court, justice of the peace or notary public. (*Cal. Pr. Act*, § 424.) And an affidavit in which the official character

of the justice before whom it is taken does not appear, is good (*Ede v. Johnson*, 15 *Cal.* 53), as courts take judicial notice of the official character of justices of the peace in their own states. But an affidavit taken in another state must be taken before a commissioner of deeds appointed by the Governor of this State, or before a Judge of a Court of record. (*Cal. Pr. Act*, § 425.) And if made in a foreign country, then before an ambassador, minister, or consul, of the United States, or the judge of a court of record. *Cal. Pr. Act*, § 426.

35. Certificate.—In case of affidavits being taken in another state, or in a foreign country, then a certificate of the Clerk of the Court, under seal, must accompany it. *Cal. Pr. Act*, § 427.

36. Date.—The *jurat* should state the day on which it was sworn. (*Doe v. Roe*, 1 *Chitt. R.* 228; 18 *Eng. Com. L. R.* 69.) Unless it is shown, when the objection is raised, that it was sworn in due season for its purpose. So held where it was shown by the opposing affidavit that the oath was taken before the judgment was entered. *Schoolcraft v. Thompson*, 7 *How. Pr.* 446.

37. Entitling Affidavit.—Of course, when there is no proceeding pending, the affidavit must not be entitled. (See *Ante*, No. 31.) Though it has been held that a superfluous title may be disregarded as not affecting the substantial rights of the party. *Pindar v. Black*, 4 *How. Pr.* 95.

38. Jurat.—The *jurat* should be in a special form where deponent is illiterate. (*Tidd. Pr.* 495; 3 *Moult. Ch. Pr.* 551.) Or blind. (*Matter of Christie*, 5 *Paige*, 242; see, also, *matter of Cross*; 2 *Ch. Sent.* 3.) Otherwise the common form is sufficient. (*Fryatt v. Lindo*, 3 *Edw.* 239.) It, however, seems to be sufficient if a party hears the paper read and swears he knows its contents.

39. Names of Deponents.—The names of all the deponents should be mentioned. Anonymous, 2 *Chitt. R.* 19; 18 *Eng. Com. Law R.* 235.

40. Place.—The *jurat* need not specify the place where it was sworn, as the venue sufficiently shows it. 1 *Tidd's Pr.* 496; *Mosher v. Heydrick*, 45 *Barb.* 594; 1 *Abb. Pr. (N.S.)* 258; 30 *How. Pr.* 161; *Belden v. Devoe*, 12 *Wend.* 223; *Manuf. and Mech. Bk. v. Cowden*, 3 *Hill*, 461.

41. Severally Sworn.—The affidavit should show that they were severally sworn. *Pardoe v. Territt*, 5 *M. and G.* 291; 44 *Eng. Com. L. R.* 159; *Kincaid v. Kipp*, 1 *Duer*, 692; 11 *N.Y. Leg. Obs.* 313.

42. State and County.—It has been held that the omission of the venue from an affidavit is fatal. The venue is an essential part of every affidavit, and *prima facie* evidence of the place where it was taken. (*Lane v. Morse*, 6 *How. Pr.* 394; *Cook v. Staats*, 18 *Barb.* 407; compare *Parker v. Baker*, 8 *Paige*, 428; *Barnard v. Darling*, 1 *Barb. Ch.* 218.) This certainly cannot be laid down as the rule with all classes of affidavits. If by the venue it appears that the affidavit was taken at a place beyond that where the officer was authorized to act, it will not be received by the court. (*Davis v. Rich*, 2 *How. Pr.* 86; *Sandland v. Adams*, *Id.* 127; *Snyder v. Omstead*, *Id.* 181.) But it is no objection that it does not appear that the affidavit was sworn to within the limits of the city for which the commission was appointed. The Court will not presume the contrary. *Parker v. Baker*, 8 *Paige*, 428. .

43.—Subscription. The affidavit should be subscribed by deponent or deponents. (1 *Newl. Ch. Pr.* 165; *Hathway v. Scott*, 11 *Paige*, 173; overruling in effect, *Haff v. Spicer*, 3 *Cai.* 190; *Col. & C. Cas.* 495; and *Jackson v. Virgil*, 3 *Johns.* 540), which held that if an affidavit begins with the name of the deponent, and appears to have been duly sworn to before a proper magistrate, it is sufficient, without the signature of deponent.

42. Subscription to Jurat.—The *jurat* must be subscribed by the officer, with his official addition. (*Ladow v. Groom*, 1 *Den.* 429; *Jackson v. Stiles*, 3 *Cai.* 128.) Compare, as to addition, (*Hunter v. Le Conte*, 6 *Cow.* 728.) An affidavit should show upon its face that it was made before some officer competent to take affidavits. *Lane v. Morse*, 6 *How. Pr.* 395.

45. That I am, etc.—The description or residence of deponent should be directly alleged, as above. *Exp.* *Bank of Monroe*, 7 *Hill.* 177; *Cunningham v. Goellet*, 4 *Den.* 71; *Staples v. Fairchild*, 3 *N.Y.* (3 *Comst.*) 41; *Payne v. Young*, 8 *N.Y.* (4 *Seld.*) 158; compare *People v. Ranson*, 2 *N.Y.* (2 *Comst.*) 490.

*No. 24.**Certificate of Clerk to Affidavit.*

State of }
 County of } ss.

I, S. T., Clerk of the County Court of said County of, do hereby certify that O. P., before whom the above affidavit was taken, is a judge of the County Court [*or other title*], which is a court of record of said state [*or county, as the case may be*], having a seal, existing pursuant to the laws thereof, in and for said county [*or country, district, or otherwise*], and that he is duly qualified and commissioned as such, and that the subscription to the same in his genuine signature.

WITNESS my hand, and the seal of said Court, at, this day of, 187..

[SEAL.]

S. T.,
County Clerk.

*No. 25.**Jurat, where Deponent is Blind or Illiterate.*

Sworn before me, this day of, 187., the same having been in my presence [*or by me*] read to the deponent, he being blind [*or illiterate*], and he appearing to me to understand the same.

R. S.
Notary Public.

*No. 26.**Jurat, where Deponent is a Foreigner.*

Sworn before me, this day of, 187.,
I having first sworn R. M., an interpreter to interpret
truly the same to the deponent, who is a foreigner not
understanding the language, and he having so inter-
preted the same to deponent.

A. C.,
County Clerk.

CHAPTER III.

VERIFICATION OF PLEADINGS.

1. The statute provides that every pleading shall be subscribed by the party or his attorney, and when the complaint is verified, the answer shall be verified also; (*Cal. Pr. Act*, § 51; *N.Y. Code*, § 156; 1 *Van Santv. Pl.* 778; 1 *Whitt. Pr.* 598; *Hubbell v. Livingston*, 1 *N.Y. Code R.* 63; *Anable v. Anable*, 24 *How. Pr.* 92; *Ehle v. Haller*, 10 *Abb. Pr.* 287;) the object of the verification being to secure good faith in the averments of the party. *Patterson v. Ely*, 19 *Cal.* 28.

2. There is nothing in the statute absolutely requiring the complaint to be verified, with the exception of complaints in actions for an injunction. (*Cal. Pr. Act*, § 113; *Falkenburg v. Lucy*, *Cal. Sup. Ct., Apl. T.*, 1868.) Or in actions brought against steamers, boats, and vessels. (*Cal. Pr. Act*, § 319.) So, also, in actions for divorce; (*Gen. Laws of Cal.*, ¶ 2,421;) and such other actions as are specially provided for. The safer and better practice, however, is to verify the complaint in all cases, and if the complaint is verified the answer, as above stated, shall be verified also, except when an admission of the truth of the complaint might subject the party to prosecution for felony or misdemeanor. (*Cal. Pr. Act*, § 52; *N.Y. Code*, § 157; *Hill v. Muller*, 2 *Sandf.* 684; *White v. Cummings*, 3 *Id.* 716; *Thomas v. Harrop*, 7 *How. Pr.* 57; *Springstead v. Robinson*, 8 *Id.* 41; *Scoville v. New*, 12 *How. Pr.* 319; *Lynch v. Todd*, 13 *Id.* 547; *Clapper v. Fitzpat-*

rick, 1 *N.Y. Code R.* 69; *Wheeler v. Dixon*, 14 *Id.* 151; *Anable v. Anable*, 24 *Id.* 92.) Unless such prosecution is barred by the Statute of Limitations. *Henry v. Salina Bk.*, 1 *Comst.* 86.

3. And when the Court could not see from the pleadings themselves that the admissions of the allegations in the complaint would subject the defendant to a criminal prosecution, he might show that fact by affidavit. *Scoville v. New*, 12 *How. Pr.* 319; *Lynch v. Todd*, 13 *Id.* 547; *Wheeler v. Dixon*, 14 *Id.* 151; *Anable v. Anable*, 24 *Id.* 92; *Moloney v. Dows*, 2 *Hilt.* 247; *Blaisdell v. Raymond*, 5 *Abbotts' Pr.* 144.

4. Whenever the defendant would be excused from testifying as a witness to the truth of any matter denied by the answer, he need not verify the answer. (*Drum v. Whiting*, 9 *Cal.* 422; *Blaisdell v. Raymond*, 5 *Abb. Pr.* 144; *Re Tappan*, 9 *How. Pr.* 394; *Moloney v. Dows*, 2 *Hilt.* 247; *People v. Kelly*, 24 *How. Pr.* 369; *Clapper v. Fitzpatrick*, 1 *Code R.* 69.) But defendant is not excused from verifying his answer when the complaint charges him with fraud in making the assignment. *Wolcott v. Winston*, 8 *Abb. Pr.* 425.

5. When the State, or the people of the state, or any state officer is a party, the pleading need not in any case be verified. (*Laws of Cal.* 1863-4, p. 261.) Nor in actions prosecuted by the Attorney-General on behalf of the State. *Pr. Act*, § 55.

6. A pleading shall be verified by the affidavit of the party, and if he be absent from the county, then by his attorney, or other person having a knowledge of the facts. (See *Cal. Pr. Act*, § 55; *N.Y. Code*, §

157; *Oregon*, § 79; *Nevada*, § 55; *Idaho, Id.*; *Arizona, Id.*; consult also *Humphreys v. McCall*, 9 *Cal.* 59; *Ely v. Frisbie*, 17 *Cal.* 250; *Patterson v. Ely*, 19 *Cal.* 28.) A verification is sufficient if it conform substantially to the statute. (2 *Sandf.* 647; *Ely v. Frisbie*, 17 *Cal.* 250.) A *jurat* to an answer is in form and substance an affidavit, and may be taken before a county recorder. *Pfeiffer v. Reihn*, 13 *Cal.* 643.

7. A defect in verification of a complaint even when apparent upon its face, does not render the complaint irregular, because a verification is no part of a pleading. (*George v. McAvoy*, 6 *How. Pr.* 200.) It only operates to relieve defendant from the obligation verify his answer. This, however, cannot be in cases where the complaint is required to be sworn to. (*Van Horne v. Montgomery*, 5 *How. Pr.* 238; *Lane v. Morse*, 6 *Id.* 394; *Waggoner v. Brown*, 8 *Id.* 212; *Quin v. Tilton*, 2 *Duer.* 648; *Strauss v. Parker*, 9 *How. Pr.* 342; *Treadwell v. Fassett*, 10 *Id.* 184; *Hubbard v. Nat. Pro. Ins. Co.*, 11 *Id.* 149; *Williams v. Riel*, 11 *Id.* 374; see *Fitch v. Bigelow*, 5 *How. Pr.* 237; *Mason v. Brown*, 6 *Id.* 48; *Stannard v. Mattice*, 7 *Id.* 4; *Webb v. Clark*, 2 *Sand.* 647.) If such defect be latent, the remedy is by motion. *Gilmore v. Hempstead*, 4 *How. Pr.* 153.

8. Before whom Verified.—The attorney of plaintiff, being a notary public, may take the affidavit verifying the complaint. (*Kuhland v. Sedgwick*, 17 *Cal.* 123.) The objections to the verification to the complaint, that it was not authenticated by the seal of the notary; that there was no venue to the affidavit; that there was no evidence that the officer was a notary public, etc., being technical, should be taken in the court below, and cannot be raised for the first time in this (Supreme) Court. *Id.*

9. Effect of Verification.—As to the effect of verification when a written instrument is embodied in a complaint, consult (*Cal. Pr. Act*, § 53; *Corcoran v. Doll*, 32 *Cal.* 83; see, also, *Heath v. Lent*, 1 *Cal.* 411.) When embodied in an answer, see *Cal. Pr. Act*, § 54.

10. Subscription.—The verification must be subscribed by the party making it. (*Laimbeer v. Allen*, 2 *Sandf.* 648.) And such subscription, it has been held, was a sufficient subscription of a pleading. (*Hubbell v. Livingston*, 1 *Code R.* 63.) A verified answer is defective if neither the answer nor the verification are subscribed. *Laimbeer v. Allen*, 2 *Sandf.* 648; *S. C.*, 2 *Code R.* 15.

11. Want of Verification.—The objection to the want of verification of a complaint, where verification is required by statute, must be taken either before answer or with the answer. The filing of the answer waives the defect. *Greenfield v. Steamer "Gunnell,"* 6 *Cal.* 69; *Laimbeer v. Allen*, 2 *Code R.* 15.

12. When Defendant may Verify Answer.—Defendant may be allowed to verify his answer before or at the trial. (*Angier v. Masterson*, 6 *Cal.* 61; *Arrington v. Tupper*, 10 *Cal.* 464; *Lattimer v. Ryan*, 20 *Id.* 628.) If defendant omit to verify the answer to a verified complaint, the plaintiff may proceed as if no answer was filed. (*Stout v. Curran*, 7 *How. Pr.* 36; *Moloney v. Dows*, 2 *Hill.* 247; *Hull v. Ball*, 14 *How. Pr.* 305; *Graham v. McCoun*, 5 *How. Pr.* 353; *Littlejohn v. Munn*, 3 *Paige*, 280.) Inability of counsel to obtain defendant's verification in time cannot avail in resisting a motion to strike out. *Drum v. Whiting*, 9 *Cal.* 422.

No. 27.

Verification by Sole Plaintiff, or Sole Defendant.

State of California,
City and County of } ss.

A. B., the plaintiff [or defendant] above named,
being duly sworn, says as follows:

1. I have read the foregoing complaint [or answer]

and know the contents thereof and that the same is true of my own knowledge.

[SIGNATURE.]

Subscribed and sworn to }
before me, this day }
of, 187.. }

J. K.
County Clerk.

13. Information and Belief.—Where the pleading states nothing on information and belief, the above form is sufficient. *Patterson v. Ely*, 19 *Cal.* 28; *Kinkaid v. Kipp*, 1 *Duer*, 692; *Ross v. Longmuir*, 5 *Abb. Pr.* 326.

14. Of his own Knowledge.—A verification omitting these words was held sufficient in (*Southworth v. Curtis*, 6 *How. Pr.* 271); but adjudged fatal in (*Williams v. Riel* 11 *How. Pr.* 375; *Tibballs v. Selfridge* 12 *Id.* 64.) That “the same is true according to the best of his knowledge and belief” is insufficient. *Van Horne v. Montgomery*, 5 *How. Pr.* 238.

15. That the same is True.—A verification alleging that “the same is substantially true,” etc., was held insufficient, as containing a qualification that was a material departure from the requirements of the Code. *Waggoner v. Brown*, 8 *How. Pr.* 212.

No. 28.

On Information or [and] belief.

[VENUE.]

A. B., the plaintiff above named, being duly sworn, says as follows:

I have read the foregoing complaint and know the contents thereof, and that the same is true of my own knowledge, except as to those matters therein stated

on information or [and] belief, and as to those matters I believe it to be true.

[SIGNATURE.]

Subscribed and sworn to }
before me, this day }
of, 187.. }

J. K.
Nortary Public.

17. Allegation, Form of.—If the pleader avers matters “upon information *and* belief,” or “upon information *or* belief,” the verification will be sufficient if his affidavit states that as to the matters thus alleged he believes the pleading to be true. *Patterson v. Ely*, 19 *Cal.* 28.

18. Belief, Meaning of.—The word “belief” is to be taken in its ordinary sense, and means the actual conclusion of the party drawn from information. Positive knowledge and mere belief cannot exist together. *Humphreys v. McCall*, 9 *Cal.* 59.

19. On Information or Belief.—There seems to be no reason why our statute prescribes that the verification *shall be* “upon information *or* belief,” instead of “upon information *and* belief,” yet the former is the statute of *this* State; in New York, the statute is different; there the word “and” is used. There can be no reason why the language of the verification should not follow the language of the pleading verified. In such case the verification should use the word “or” or “and” to correspond with the pleading.

No. 29.

By one of several Plaintiffs or Defendants.

[VENUE.]

A. B., being duly sworn on his own behalf, and on behalf of R. S., one of the other defendants therein, says as follows:

1. I am one of the defendants in the above-entitled action.

2. I have read the foregoing answer, and know the contents thereof, and that the same is true of my own knowledge, except as to the matters which are therein stated on information or [and] belief, and as to those matters, I believe it to be true.

[SIGNATURE.]

[*Jurat.*]

20. Husband and Wife.—In an action against husband and wife, where her interest is separate, the answer must be verified by both, if relied on as the answer of both. *Youngs v. Seeley*, 12 *How. Pr.* 395; *Reed v. Butler*, 2 *Hill*. 589.

21. When one may Verify.—One of several plaintiffs may verify. (*Patterson v. Ely*, 19 *Cal.* 28; *Kelly v. Bowman*, *Transcript*, 18 *July*, 1861.) And in certain cases it has been held that where the action is joint, the parties should unite in the verification. *Andrews v. Storms*, 5 *Sand.* 609; *Alfred v. Watkins*, 1 *Code R. (N.S.)* 343; *Hull v. Ball*, 14 *How. Pr.* 305.

No. 30.

By two Parties, severally.

[VENUE.]

A. B. and C. D., the plaintiffs [*or* defendants] above named, being severally duly sworn, say, each for himself, as follows:

1. I have read the foregoing complaint [*or* answer], and know the contents thereof, and the same is true of my own knowledge [except as to those matters stated therein on information and belief, and as to those matters I believe it to be true].

[SIGNATURES.]

[*Jurat.*]

*No. 31.**By Officer of Corporation.*

[VENUE.]

A. B., being duly sworn, says as follows:

1. I am an officer of the company, the plaintiffs [*or* defendants] above named, to wit, the President thereof.

2. I have read the foregoing complaint [*or* answer], and know the contents thereof, and the same is true of my own knowledge [except as to those matters which are therein stated on information or [and] belief, and as to those matters I believe it to be true].

[SIGNATURE.]

[*Jurat.*]

22. Grounds of Belief.—Sources of Knowledge.—It has been held that a verification made by an officer of a corporation need not state the grounds of belief or sources of knowledge. It is a verification of the corporation. *Glaubenskle v. Hamburg and American Packet Co.*, 9 *Abb. Pr.* 104; compare *Van Horne v. Montgomery*, 5 *How. Pr.* 238; *Anable v. Anable*, 24 *Id.* 92.

23. Managing Agent.—A managing agent of a corporation is an officer of the corporation within the provisions of the Act. *Glaubenskle v. Hamburg and American Packet Co.*, 9 *Abb. Pr.* 104.

BY ATTORNEY OR AGENT.

The attorney may verify a complaint in two cases.

First, When the action is founded on a written instrument in his possession.

Second, When all the material allegations of the

petition are within his personal knowledge. *Mason v. Brown*, 6 *How. Pr.* 484; *Treadwell v. Fassett*, 10 *Id.* 184; *Wheeler v. Chesley*, 14 *Abb. Pr.* 441.

No. 32.

By Attorney or Agent, where Demand is on a Written Instrument in his possession.

[VENUE.]

A. B. being duly sworn, says as follows:

1. I am the agent of the plaintiff in this action for the purpose of collecting the demand sued in the complaint [*or the general agent of the plaintiff in this city, or the attorney, or one of the attorneys for the plaintiff in this action*].

2. The foregoing complaint [*or answer*] is true of my own knowledge [*except as to those matters therein stated on information or [and] belief; and as to those matters I believe it to be true*].

3. The reason why the verification is not made by the plaintiff [*or defendant*] is that the action [*or defense*] is founded upon a written instrument, for the payment of money only, and such instrument is in my possession, and my knowledge is derived from said instrument; and also from the admissions of the plaintiff made to me [*or also from having witnessed the execution and delivery of the same, or other sources of personal knowledge, if any*]. *Where a portion or all of the material allegations are on information or belief, add or substitute the following clause:* that the grounds of my belief are the statements of the plaintiff to me, *or other grounds, if any.*

[*Jurat.*]

[SIGNATURE.]

24. Forms of Verification.—For examples of sufficient verifications by attorneys, see (*Dixwell v. Wordsworth*, *Wheeler v. Chelsey*, 14 *Abb. Pr.* 441; *Mason v. Brown*, *Stannard v. Mattice*, 7 *How. Pr.* 4; *Myers v. Gerritts*, 13 *Abb. Pr.* 106; *Gourney v. Wersuland*, 3 *Duer*, 613; *Ross v. Longmuir*, 24 *How. Pr.* 49.) For examples of insufficient verifications by attorneys or agents, see *Fitch v. Bigelow*, 5 *How. Pr.* 237; *Meads v. Gleason*, 13 *How. Pr.* 313; *Tibballs v. Selfridge*, 12 *How. Pr.* 64; *Soutter v. Mather*, 14 *Abb. Pr.* 440; *Bank of Maine v. Bull*, 14 *How. Pr.* 311.

25. Nature of Agency.—A verification by an agent must disclose the nature of the agency. (*Boston Locomotive Works v. Wright*, 15 *How. Pr.* 253.) But it is not necessary to verify by the agent who knows most about the matter. *Drevert v. Apsert*, 2 *Abb. Pr.* 165.

26. Notes in Possession.—Stating that the notes were in possession of deponent sufficiently avers that deponent was agent of the plaintiff. (*Myers v. Gerritts*, 13 *How. Pr.* 106.) And authorized to verify the complaint. (*Myers v. Gerritts*.) Whether plaintiff was within the county or not. *Wheeler v. Chelsey*, 14 *Abb. Pr.* 441.

No. 33.

The same, when the Party is absent from the County.

[VENUE.]

A. B., being duly sworn, says as follows:

1. I am the attorney [*or* one of the attorneys] of the plaintiff [*or* defendant] in this action.

2. I have read the foregoing complaint [*or* answer] and know the contents thereof, and that it is true of my own knowledge [except as to those matters therein stated on information or [and] belief and as to those matters I believe it to be true].

3. My knowledge is derived from the possession of the notes in suit, and from the admissions of the defend-

ant [*or* plaintiff] to me [*or other sources of personal knowledge*].

4. The grounds of my belief are, information received from the letters of the plaintiff [*or* defendant], or from M. N., of, the agent of the plaintiff [*or* defendant] [*or state other sources of information*].

5. The reason this verification is not made by the plaintiff [*or* defendant], is that he is not within the County of, which is the county where I reside.

[*Jurat.*]

[SIGNATURE.]

27. Absence from County.—When the party is not within the county where the attorney resides, a verification made by the attorney is good, though he have no personal knowledge of the truth of the allegations. (*Humphreys v. McCall*, 9 *Cal.* 59; *Ely v. Frisbie*, 17 *Id.* 250; *Patterson v. Ely*, 19 *Id.* 28; *Lefever v. Latson*, 5 *Sandf.* 650; *Roscoe v. Maison*, 7 *How. Pr.* 121; *Stannard v. Mattice*, *Id.* 4; *Smith v. Rosenthal*, 11 *Id.* 442; *Wilkin v. Gilman*, 13 *Id.* 225; *People v. Allen*, 14 *Id.* 334; *Drevert v. Apsert*, 2 *Abb. Pr.* 165; *Myers v. Gerrits*, 13 *Id.* 106; *Gourney v. Wersoland*, 3 *Duer*, 613; *Dixwell v. Wordsworth*, 2 *Code R.* 1.) Although it appears that the client has a resident agent through whom attorney has obtained his information. *Drevert v. Apsert*, 2 *Abb. Pr.* 165.

28. Grounds of Belief.—Where an attorney or agent verifies a complaint, the verification should state the grounds of belief, and the reasons why it was not made by the party. (*Oregon Code*, § 79; *Stannard v. Mattice*, 7 *How. Pr.* 4; *Fitch v. Bigelow*, 5 *Id.* 237; *Dixwell v. Wadsworth*, 2 *Code R.* 1; *Treadwell v. Fassett*, 10 *How. Pr.* 184; *Hubbard v. Nat. Pro. Ins. Co.*, 11 *Id.* 149; *Bank of Maine v. Buel*, 14 *Id.* 311; *Boston Locom. Works v. Wright*, 15 *Id.* 253; *Soutter v. Mather*, 14 *Abb. Pr.* 440; *Meads v. Gleason*, 13 *How. Pr.* 309; *People v. Allen*, 14 *Id.* 334.) The grounds of knowledge or belief need not be set forth if all the allegations in the pleading are made in the positive form. *Ross v. Longmuir*, 15 *Abb. Pr.* 326.

29. Guardian.—The guardian, or attorney for the guardian, of an

infant plaintiff, may verify. (*Hill v. Thacter*, 2 *Code R.* 3; *Anable v. Anable*, 24 *How. Pr.* 92; *Rogers v. Cruger*, 8 *Johns.* 581.) In an action by an infant appearing by a guardian *ad litem*, the complaint may properly be verified by the guardian, and he need not do so as the agent or attorney for the infant, but may as the plaintiff. *Anable v. Anable*, 24 *How. Pr.* 92.

No. 34.

Where the absent Defendant is a Corporation.

[VENUE AND COMMENCEMENT.]

I am the attorney of the Bank, plaintiffs in the above action; I have read the foregoing complaint, and know the contents thereof, and the same is true of my own knowledge [except etc.] And I further say, that the said plaintiffs are a corporation, incorporated and transacting their business at, in the State of, not established or transacting their business in this County, neither do any of their officers reside in this County, but reside in said State of, which is the reason why this affidavit was not made by the plaintiffs; and that my knowledge, etc. [*Continue as in the above form to the end.*]

[SIGNATURE.]

[*Jurat.*]

No. 35.

Verification of Petition.

[*Venue and introduction as in Form No. 23, omitting title preceding the venue, and after description of deponent add:*]

I have read the foregoing petition subscribed by me, and know the contents thereof; that the same is [*or, where such papers are annexed*, and that the same and the accounts and inventories hereunto annexed are] true of my own knowledge [except as to the matters

therein stated on information or [and] belief and as to those matters I believe it to be true].

[SIGNATURE.]

[*Jurat.*]

- **30. Verified Petition.**—The petition for the perpetuation of testimony must be verified by the applicant therefor. *Cal. Pr. Act*, § 438.

PART THIRD.

PLEADINGS OF PLAINTIFF.

CHAPTER I.

COMPLAINTS IN GENERAL.

The complaint under the California Code is the first pleading in the action, and the foundation for all future proceedings. In modern practice, it is a substitute for the declaration at common law, and under the new system the plaintiff's allegations, showing his cause of action, whether at law or in equity, are termed the complaint. The code as adopted in most of the states and territories of the Union, declares expressly what the complaint shall contain, which is as follows: *First*, The title of the action, specifying the name of the court and the name of the county in which the action is brought, and the names of the parties to the action, plaintiff and defendant; *Second*, A statement of the facts constituting the cause of action, in ordinary and concise language, and, *Third*, a demand for the relief which the plaintiff claims.

FIRST SUBDIVISION OF COMPLAINT.

2. The first subdivision of complaints under the Practice Act, which provides what the complaint shall

contain, will be found under the title, FORMAL PARTS OF PLEADINGS, Chapter vii., where the entitling of a cause may be found, with forms and authorities in support thereof.

CHARACTER AND CAPACITY AVERRED.

3. If the plaintiff sues in a representative or official character or capacity, the character must be alleged, as well as stated in the title. (*Gould v. Glass*, 19 *Barb.* 185; *Smith v. Levinus*, 8 *N.Y.* 447; and other authorities there cited.) It is usual and proper in stating the title to a complaint in such cases, to add to the name of the party a designation stating the especial character which he sustains, as "A. B., Executor," "C. D., Sheriff." This, however, will not dispense with the necessity of the averment of the character in which he sues. Standing alone in the title would be but a mere *discriptio personæ*. 6 *N.Y.* 168; 4 *Den.* 80; 17 *Wend.* 197; 9 *Id.* 490; 8 *Cow.* 235; 7 *Barb.* 204; *Sheldon v. Hoy*, 11 *How. Pr.* 15; *Merritt v. Seaman*, 6 *Barb.* 330; *White v. Joy*, 11 *How. Pr.* 36; *Blanchard v. Strait*, 8 *How. Pr.* 83; *Bk. of Havana v. Wickham*, 7 *Abb. Pr.* 134; 16 *How. Pr.* 97, 288; *Bright v. Currie*, 5 *Sandf.* 433; 10 *L. O.* 104; *Root v. Price*, 22 *How. Pr.* 372; *Hallett v. Harrower*, 33 *Barb.* 537; *Talmage v. Chappell*, 16 *Mass.* 71; *Clarke v. Lowe*, 15 *Id.* 476; *Buffum v. Chadwick*, 9 *Id.* 103; *Russel v. Clark*, 7 *Barb.* 482; *Bently v. Jones*, 4 *How. Pr.* 202; *McMurray v. Thomas*, 5 *Id.* 14; *Parker v. Totten*, 10 *Id.* 233; *Thomas v. Desmond*, 12 *Id.* 321; *Freeman v. Fulton Fire Ins. Co.*, 14 *Abb. Pr.* 407.

4. Such an averment, and also an averment that the action is brought by him in such capacity, is sufficient to sustain a recovery in that capacity. (*Fowler v.*

Westervelt, 40 *Barb. U.S.* 374; 17 *Abb. Pr.* 59; distinguishing upon this point the decision in *Gould v. Glass*, 19 *Barb.* 179.) In general, a plaintiff cannot sue in two capacities, private and representative, in the same action. *Yates v. Kimmel*, 5 *Mo.* 87.

5. Agent.—The character of agent of a company must be averred. *Tolmie v. Dean*, *Wash. Terr.* 60.

6. Assignee.—So the character of assignee must be averred when plaintiff sues in that capacity. (*Prindle v. Caruthers*, 15 *N.Y.* 427; *Vogel v. Badcock*, 1 *Abb. Pr.* 177; *Horner v. Wood*, 15 *Barb.* 372; *Martin v. Kanouse*, 2 *Abb. Pr.* 331; *Gregory v. Freeman*, 2 *Zab. R.* 405; *Artcher v. Zeh*, 5 *Hill.* 200.) But the form of the assignment, or the consideration thereof, need not be stated. (*Id.*; *Fowler v. N. Y. Indem. Ins. Co.*, 23 *Barb.* 151; *Morange v. Mudge*, 6 *Abb. Pr.* 243.) And on an assignment by a corporation, the plaintiff need not aver that the directors were authorized to make it. *Nelson v. Eaton*, 16 *Abb. Pr.* 113.

7. Company.—In an action where a member of a company is plaintiff or defendant, membership must be averred. (*Tolmie v. Dean*, *Wash. Terr.* 60.) And the jurisdiction and a cause of action must be shown. (*Id.*) And in the State of New York where such actions will lie, in actions by or against joint stock companies, the complaint must allege that the company is a joint stock company or association, consisting of more than seven shareholders or associates. (*Tiffany v. Williams*, 10 *Abb. Pr.* 204.) But in an action in which the defendants were named *Hull & Co.*, the “& Co.” were considered surplusage. *Mulliken v. Hull*, 5 *Cal.* 245.

8. Copartnership.—A complaint which contains no other designation of the party plaintiff than the name of a copartnership firm, is deemed defective. *Gilman v. Cosgrove*, 22 *Cal.* 356; *Walker v. Parkins*, 9 *Jur.* 665; 14 *Law Jour. R.* 214, *Q. B.*; 1 *New Pr. Cas.* 199; 2 *D. & L.* 982.

9. Corporations.—In New York, where the plaintiff sues by an appropriate corporate name, it is not necessary to aver expressly that the plaintiff is a corporation; in such a case there is an implied averment to that effect. (1 *Duer*, 707; 13 *N.Y.* (3 *Kern.*) 313; *Phoenix*

Bank of N.Y. *v.* Donnell, 41 *Barb. U.S.* 571.) Plaintiff suing as supervisor, described himself in the title of the complaint as Supervisor of North Hempstead, and commenced it, "The complaint of the plaintiff above named, as Supervisor as aforesaid, shows," etc. *Held*, on demurer, a sufficient statement of the capacity in which he sued. *Smith v. Levinus*, 4 *Seld.* 472.

10. Incorporation Act.—The Act of Incorporation may be pleaded by reciting the title of the act and the date of its passage. (*Cal. Pr. Act*, § 61; *U.S. Bank v. Haskins*, 1 *Johns. Cas.* 132.) But it must be set forth with accuracy. (*Union Bk. v. Dewey*, 1 *Sandf.* 509.) But the short mode of pleading permitted by this statute is not intended to relieve corporations from proving their existence. (*Onondaga County Bank v. Carr*, 17 *Wend.* 443; compare *Bank of Waterville v. Beltser*, 13 *How. Pr.* 270; *Bank of Genesee v. Patchin Bank*, 13 *N.Y.* (3 *Kern.*) 309.) Where the original act of plaintiff's incorporation is referred to in the complaint, a vague reference to other general statutes affecting it does not render the complaint demurrable. *Sun Mutual Ins. Co. v. Dwight*, 1 *Hill.* 50.

11. Permission to Sue.—There are cases in which by reason of some special character, a party cannot sue or be sued except by permission of the Court. In such cases, the obtaining permission to sue should be alleged, stating how, when, and from whom obtained, as in case of a receiver; (1 *Ves. Jun.* 165; 9 *Id.* 335; 3 *Bro. C. Ct.* 88; 16 *Wend.* 410; 19 *N.Y.* 376;) a guardian of a habitual drunkard; (*Hall v. Taylor*, 8 *How. Pr.* 428; *Person v. Warren*, 14 *Barb.* 488;) or of a lunatic; *Williams v. Cameron*, 26 *Barb.* 172; *Graham v. Scripture*, 17 *How. Pr.* 501.

SECOND SUBDIVISION OF COMPLAINT — STATEMENT OF CAUSE OF ACTION.

12. The complaint should state expressly and in direct terms the facts constituting the cause of action, and leave no essential fact in doubt or to be inferred or deduced by argument from the other facts stated, as inference, argument, or hypothesis cannot be tolerated in a pleading. (*Joseph v. Holt*, *Cal. Sup. Ct., Apl.*

T., 1869; citing *Green v. Palmer*, 15 Cal. 411.) A cause of action being the right a person has to institute and carry through a proceeding. *Meyer v. Van Collem*, 28 Barb. 231.

13. In order to ascertain what is a sufficient statement of a cause of action, it will be necessary to review here a portion of the matter contained in "*Pleadings in General*." And as the object of the complaint is to present the facts upon which the action is founded in ordinary and concise language (*Cal. Pr. Act*, § 39), the manner of the statement of those facts becomes a matter of importance, not only in reference to the facts which *should be alleged*, but of such facts as *need not* be alleged and which ought to be omitted from the complaint.

14. It is not in general necessary to make it appear on the face of a complaint that the court has jurisdiction of the person or of the subject matter of the action. *Koenig v. Mott*, 8 Abb. Pr. 304; *Spencer v. Rogers Loco. Works*, 17 Abb. Pr. 110.

15. Allegations in a complaint must be consistent with each other, and such as are not consistent, as well as such allegations as are absurd, and the truth of which is impossible, may be regarded as surplusage. *Sacramento Co. v. Bird*, 31 Cal. 66.

16. An averment at the end of a complaint that the defendant *owes* the plaintiff, is a mere conclusion of law and is not admitted by demurrer. *Millard v. Baldwin*, 3 Gray, 484; *Codding v. Mansfield*, 7 Gray, 272; 13 Gray, 392.

17. The complaint need not be dated, nor need it state the time when the action was commenced. (*Maynard v. Talcott*, 11 *Barb.* 569.) But the clerk shall indorse on the complaint the day, month, and year the same is filed. *Cal. Pr. Act*, § 23; and *Codes of Nevada, Idaho, Arizona*, etc.

WHAT FACTS ARE TO BE STATED.

18. Those facts, and those only, should be stated, which constitute the cause of action. (*Green v. Palmer*, 15 *Cal.* 413; *Wilson v. Cleaveland*, 30 *Id.* 192; *Racouillat v. René*, 32 *Id.* 455; *Buddington v. Davis*, 6 *How. Pr.* 402.) And the kind of relief sought should be explicitly demanded. *Bankston v. Farris*, 26 *Mo.* 175; *Biddle v. Boyce*, 13 *Mo.* 532.

19. All the *material facts* out of which the cause of action arose ought to be stated, and none others. (*Brackett v. Wilkinson*, 13 *How. Pr.* 102; *Thompson v. Minford*, 11 *Id.* 275; *Van Nest v. Talmage*, 17 *Abb. Pr.* 99; *Wade v. Rusher*, 4 *Bosw.* 537.) And they should be stated in an intelligible and issuable form, capable of trial. (*Boyce v. Brown*, 7 *Barb. U.S.* 81.) Thus, a statement in a complaint that the contract sued on was made payable in a specific kind of money, is an allegation of a material fact. *Wallace v. Eldredge*, 27 *Cal.* 498.

20. It is laid down as a rule that the complaint must contain all the facts which, upon a general denial, the plaintiff will be bound to prove in the first instance, to protect himself from a nonsuit, and show himself entitled to a judgment. (1 *Van Santv.* 215; 9 *Barb.*

S. C. R. 158; 3 *Sandf.* 437; 4 *Id.* 665; 4 *How. Pr.* 98; 5 *Id.* 390; 7 *L. O.* 149; *Id.* 315; 1 *Code R.* 102; 2 *Id.* 59; 3 *Id.* 64; 5 *Sand.* 564; 1 *Duer*, 707; 2 *Duer*, 670.) And this statement must be made without unnecessary repetition. 2 *Comst.* 253; *N.Y. Code*, 142; *Laws of Oregon*, § 65; *Wash. Terr.* § 53.

21. The statute in this respect is only declaratory of the common law. (*Goodwin v. Stebbins*, 2 *Cal.* 103.) And is applicable as well to every description of pleading under the Code, whether in law or equity, all distinctions in the form of actions having been abolished. (*Piercy v. Sabin*, 10 *Cal.* 27; *Cordier v. Schloss*, 12 *Id.* 147.) This rule governs all cases of pleading, legal and equitable. *Goodwin v. Hammond*, 13 *Cal.* 169; *Riddle v. Baker*, *Id.* 302; *Payne v. Treadwell*, 16 *Id.* 243.

22. A complaint is materially defective, if, to lay the foundation of a recovery, the proof must go further than the allegations it contains. (*Stanley v. Whipple*, 2 *McLean*, 35.) It must be so framed "as to raise upon its face the question whether, admitting the facts stated to be true, the plaintiff is entitled to judgment, instead of leaving that question to be raised or determined upon the trial;" (1 *Van Santv.* 216;) for where a complaint shows no legal cause of action on its face, a judgment by default can no more be taken than it can be over a general demurrer. *Abbe v. Marr*, 14 *Cal.* 211.

23. If the complaint contains one good count, though the findings of fact are defective, it will be sufficient; (*Lucas v. San Francisco*, 28 *Cal.* 591; *Hayden v. Sample*, 10 *Mo.* 215; *State v. Campbell*, *Id.* 724; *Marshall*

v. Bouldin, 8 *Id.* 244;) since a plaintiff can only recover for such causes of action as are stated in his complaint. (*Benedict v. Bray*, 2 *Cal.* 256.) He must show a good cause of action (*Russel v. Ford*, 2 *Cal.* 86; *Little v. Mercer*, 9 *Mo.* 216), and facts sufficient to constitute it. *Summers v. Farrish*, 10 *Cal.* 347; *Maguire v. Vice*, 20 *Mo.* 429; *Bersch v. Dittrick*, 19 *Id.* 129.

24. Allegations made upon information and belief should be distinguished by the phrase, "alleges upon information and belief." Compare *Howell v. Fraser*, 6 *How. Pr.* 221; *Bement v. Wisner*, 1 *Code R. (N.S.)* 143; *Fry v. Bennett*, 5 *Sandf.* 54; 9 *N. Y. Leg. Obs.* 330; 1 *Code R. (N.S.)* 238; *Radway v. Mather*, 5 *Sandf.* 654; *Borrowe v. Milbank*, 5 *Abb. Pr.* 28; *Ricketts v. Green*, 6 *Id.* 82; *N. Y. Marbled Iron Works v. Smith*, 4 *Duer*, 362; *Truscott v. Dole*, 7 *How. Pr.* 221; *Finnerty v. Barker*, 7 *N. Y. Leg. Obs.* 316; *St. John v. Beers*, 24 *How. Pr.* 377; *Woodruff v. Fisher*, 17 *Barb.* 224; *Grim v. Wheeler*, 3 *Edw.* 334; *Norton v. Woods*, 5 *Paige*, 260.

CAUSES OF ACTION UNITED.

25. Causes of action arising out of the *same transaction*, against the *same* parties, where all the defendants are interested in the *same* claim of right, and where the relief asked for in relation to each is of the *same* general character, may in general be united. *Varick v. Smith*, 5 *Paige*, 137; *Jones v. Steamship "Cortes,"* 17 *Cal.* 487.

26. That the plaintiff may by statute unite several causes of action in one complaint, see (*Cal. Pr. Act*, § 64; and the *Codes of Oregon, Nevada, Arizona, Idaho*,

etc.;) but the practice of setting forth a single cause of action in different counts is abolished. *Whittier v. Bates*, 2 *Abb. Pr.* 477; *Lackey v. Vanderbilt*, 10 *How. Pr.* 155; *Dunning v. Thomas*, 11 *Id.* 281; *Churchill v. Churchill*, 9 *Id.* 557; *Stockbridge Ins. Co. v. Mellen*, 5 *Id.* 439; but compare *Mead v. Mali*, 15 *Id.* 347.

27. Thus, an action for damages and also for a penalty, in a suit against a sheriff for a failure to execute process, may be united. (*Pearkes v. Freer*, 9 *Cal.* 642.) So, a complaint in ejectment may be for two separate and distinct pieces of land, but the two causes of action must be separately stated, and affect all the parties to the action, and not require different places of trial. (*Boles v. Cohen*, 15 *Cal.* 150.) And under our system a cause of action in tort may be united with a cause of action on contract, if the two causes of action arise out of the same transaction. *Jones v. Steamship "Cortes,"* 17 *Cal.* 487.

28. * Each cause of action should be separately and distinctly stated. (*Boles v. Cohen*, 15 *Id.* 150; *Sturges v. Burton*, 8 *Ohio*, 215.) And each separate and distinct proposition of each cause of action should be separately set forth, and logical order should be observed in the statement of the premises, leaving the conclusions of law deduced therefrom to be drawn by the Court. (See *Post.*) The better practice is to number each cause of action and each proposition of each cause of action. *Benedict v. Seymour*, 6 *How. Pr.* 298; *Blanchard v. Strait*, 8 *How. Pr.* 83.

29. The statement of the cause of action in separate counts may be allowed where there is a fair or reason-

able doubt of the ability of the plaintiff to safely plead them in one mode only. (*Jones v. Palmer*, 1 *Abb. Pr.* 442.) As to stating claims in two aspects, consult 4 *Johns. Ch.* 287; 2 *Brown C. C.* 338, 518; 1 *Atk.* 598; 13 *Price*, 721; *Com. Dig. Chan.* 4; 1 *Rent; Adam's Eq.* 238, n. 1; 1 *Freem. Ch.* 99; 1 *Stor. Eq. Jur.* § 470-485, 684, 686; 2 *Barb.* 644; *Van Rensselaer v. Layman*, 10 *How. Pr.* 505; *Buckman v. Astor Mut. Ins. Co.*; cited in *Ketcham v. Zerega*, 1 *E. D. Smith*, 553.

30. The causes of action required to be separately stated are such as by law entitle the plaintiff to separate actions, or which would be a perfect cause of action in itself. (*Sturges v. Burton*, 8 *Ohio*, 215.) And such statement should begin with appropriate words to designate it as such. *Benedict v. Seymour*, 8 *How. Pr.* 298; *Lippencott v. Goodwin*, *Id.* 242.

31. Each statement must be complete in itself, or must be made so by express reference to other parts of the pleading. (*Sinclair v. Fitch*, 3 *E. D. Smith*, 677; *Landau v. Levy*, 1 *Abb. Pr.* 376; *Loosey v. Orser*, 4 *Bosw.* 391; *Ritchie v. Garrison*, 10 *Abb. Pr.* 246.) That reference may be made to other allegations, was the rule at common law. (*Freeland v. McCullough*, 1 *Den.* 414; *Crookshank v. Gray*, 20 *Johns.* 344; *Griswold v. Nat. Ins. Co.* 3 *Cow.* 96; *Loomis v. Levick*, 3 *Wend.* 205; *Porter v. Cummings*, 7 *Id.* 172.) A complaint seeking to recover on two causes of action must show how much is due on each. In a word, each cause of action must be clearly and explicitly stated, and must be perfect in itself. *Buckingham v. Waters*, 14 *Cal.* 146; *Clark v. Farly*, 3 *Duer*, 645.

CAUSES OF ACTION WHICH CANNOT BE UNITED.

32. Causes of action arising under *different* classes, as specified in § 64 of the California Practice Act, cannot in general be united in one action. So, inconsistent causes of action cannot be united in the same complaint. (1 *Van Santv.* 54-5 ; *Linden v. Hepburn*, 3 *Sand.* 668.) Nor can the pleader under the present system, any more than under the old, ask for two or more distinct kinds of relief, inconsistent with or repugnant to each other. 1 *Van Santv.* 55.

33. Thus, an action in ejectment for breach of condition, with damages for breach of covenant, are deemed incompatible. (*Underhill v. Saratoga and Washington R.R. Co.*, 20 *Barb.* 455.) So, an action in ejectment against vendor, and an equitable claim that vendor execute a conveyance, cannot in general be united. (*Lattin v. McCarty*, 17 *How. Pr.* 239; 8 *Abb. Pr.* 225.) As to ejectment and equitable relief generally, see *Onderdonk v. Mott*, 34 *Barb.* 106.

34. A claim for the possession of real property, with damages for its detention, cannot be joined in the same complaint, under any system of pleading, with a claim for consequential damages arising from a change of a road, by which a tavern keeper may have been injured in his business. (*Bowles v. Sacramento Turnpike Co.*, 5 *Cal.* 224.) A complaint which joins an action of "*trespass quare clausum fregit*," ejectment, and prayer for relief in chancery, will be held bad on demurrer. (*Bigelow v. Cove*, 7 *Cal.* 133; *Gates v. Kieff*, *Id.* 124; *Budd v. Bingham*, 18 *How. Pr.* 494; *Frost v. Duncan*,

19 *Barb.* 560; *Cowenhoven v. City of Brooklyn*, 38 *Barb.* 9; *Hotchkiss v. Auburn and Rochester R.R. Co.*, 36 *Barb.* 600; *Hulce v. Thompson*, 9 *How. Pr.* 113; *Burdick v. McAmbley*, *Id.* 117.) So, claims for injury to personal property, and for its possession, cannot be united. (*Spalding v. Spalding*, 1 *Code R.* 64; *Smith v. Hallock*, 8 *How. Pr.* 73.) Enforcement of equitable lien, with demand for possession in replevin cannot be united. *Otis v. Sill*, 8 *Barb.* 102.

35. A count in *assumpsit* cannot be joined with a count in *tort*; and upon trial the plaintiff may be compelled to elect upon which he will proceed. (*Noble v. Laley*, 50 *Penn.* 281; *Childs v. Bank of Missouri*, 17 *Mo.* 213; *Mooney v. Kennett*, 19 *Id.* 551; *Lackey v. Vanderbilt*, 10 *How. Pr.* 155; *Colwell v. N.Y. and Erie R.R. Co.*, 9 *How. Pr.* 311; see *Ford v. Mattice*, 14 *How. Pr.* 91; *Dunning v. Thomas*, 11 *How. Pr.* 281; *Whittier v. Bates*, 2 *Abb. Pr.* 577.) But in California, where both arise out of the same transaction they may be united. It is held in Pennsylvania, that a count in *assumpsit* cannot be joined with a count for a deceit; and where added after an award of arbitrators, and an appeal therefrom by the defendant, under a declaration containing a count for deceit only, it was properly stricken off by the Court on the trial. *Pennsylvania R.R. Co. v. Zug*, 47 *Penn.* 480.

36. Counts in debt and covenant cannot be joined. Such a declaration is bad on general demurrer. (*Brumbaugh v. Keith*, 31 *Penn.* 327.) A claim on a demand for money had and received cannot be joined with a claim to compel the delivery up of notes. (*Cahoon v.*

Bank of Utica, 3 *Code R.* 110; *Aleger v. Scoville*, 6 *How. Pr.* 131.) It seems that the vendor cannot unite in the same action a claim against a broker for damages for fraudulent sale of land with a claim against a purchaser for a reconveyance or accounting. (*Gardner v. Ogden*, 23 *N.Y.* 327.) So, a landlord cannot demand an injunction against a breach of covenant in the same action in which he demands a forfeiture of the lease. Such reliefs are inconsistent. *Linden v. Hepburn*, 3 *Sandf.* 668; *S.C.* 5 *How. Pr.* 188; 9 *N.Y. Leg. Obs.* 80.

37. Claim for equitable relief against a corporation and one for damages against individual directors, are incapable of joinder. (*House v. Cooper*, 30 *Barb.* 157; 16 *How. Pr.* 292.) So, where the interests of the defendants are several, as in case of the several purchasers of securities, an equitable suit to compel their surrender, the causes of action against the several purchasers cannot be united. *Lexington and Big Sandy R.R. Co. v. Goodman*, 25 *Barb.* 469; 15 *How. Pr.* 85; 5 *Abb. Pr.* 493; *Reed v. Stryker*, 3 *Abb. Pr.* 109; *Bradley v. Blair*, 17 *Barb.* 480; *Hess v. The Buffalo and Niagara Falls R.R. Co.*, 29 *Barb.* 391.

38. An individual and representative claim cannot properly be joined in the same action. *Lucas v. N.Y. Cent. R.R. Co.*, 21 *Barb.* 245; *Hall v. Fisher*, 20 *Barb.* 441; *Landon v. Levy*, 1 *Abb. Pr.* 376; *McMahon v. Allen*, 1 *Hilt.* 103; 3 *Abb. Pr.* 89; *Voorhis v. Child's Ex'r*, 17 *N.Y.* 354; affirming same case, 18 *Barb.* 592; 1 *Abb. Pr.* 43; *Higgins v. Rockwell*, 2 *Duer* 650; *Tracy v. Suydam*, 30 *Barb.* 110; *Bucknam v. Brett*, 22 *How. Pr.* 233; *Pinkney v. Wallace*, 1 *Abb. Pr.* 82;

Morehouse *v.* Ballow, 16 *Barb.* 289; Parker *v.* Jackson, 16 *Barb.* 33; Stewart *v.* Kissam, 11 *Barb.* 271; Roe *v.* Swezey, 10 *Barb.* 247; Gridley *v.* Gridley, 33 *Barb.* 250.

39. Complainant cannot unite in one bill a demand that defendant account individually for rents received by him with a demand that he account as administrator for rents received by the intestate to whom he succeeded. (2 *Anst.* 469; 1 *Dan. Ch. Pr.* 449; 4 *Cow.* 701; Warth *v.* Radde, 28 *How. Pr.* 230; 18 *Abb. Pr.* 396; Latting *v.* Latting, 4 *Sandf. Ch.* 31; Bartlett *v.* Hatch, 17 *Abb. Pr.* 461; Myer *v.* Cole, 12 *Johns.* 349; Reynolds *v.* Reynolds, 3 *Wend.* 244.) So, a claim against surviving partners and executors of deceased partners, cannot be united unless the survivor is insolvent. McVean *v.* Scott, 46 *Barb.* 379.

40. Actions on contracts, injury to person, or injury to property, are incompatible and cannot be united, as it is essential that they should all belong to the same class. (Hulce *v.* Thompson, 9 *How. Pr.* 113; Burdick *v.* McAmbly, 9 *Id.* 117; Furniss *v.* Brown, 8 *How. Pr.* 59, 62; 7 *Id.* 134; Cahoon *v.* Bank of Utica, 3 *Code R.* 110; Landau *v.* Levy, 1 *Abb. Pr.* 376.) Action to recover damages for alleged injuries to the person and property of the plaintiff, and for false imprisonment of the plaintiff's person, for forcibly ejecting him from a house and premises alleged to have been in plaintiff's possession, and keeping him out of the possession thereof. *Held*, improper joinder of causes of action. (McCarty *v.* Fremont, 23 *Cal.* 197.) So, the tort of a husband and separate tort of wife cannot be united. (Malone *v.* Stilwell, 15 *Abb. Pr.* 421.) A claim for damages for a personal tort cannot be united with a

demand properly cognizable in a court of equity in the same action. *Mayo v. Madden*, 4 *Cal.* 27.

41. As a rule, personal actions *ex contractu* and *ex delicto* cannot be united (*White v. Snell*, 5 *Pick.* 425; *Boston v. Otis*, 20 *Id.* 41), as the distinction between actions growing out of torts and those growing out of contracts must still be preserved. *Knickerbocker v. Hall*, 3 *Nev.* 194; *Carson River Lumbering Co. v. Bassett*, 2 *Nev.* 249.

42. It has been held, however, that a party whose property has been wrongfully taken, may waive the tort and sue in *assumpsit*. (*Eversole v. Moore*, 3 *Bush*, 49; *contra*, *Ladd v. Rogers*, 11 *Allen*, 209.) But, whichever ground of recovery the pleader adopts, the substantial allegations of the complaint in a given case must be the same under our practice as were required at the common law. *Miller v. Van Tassel*, 24 *Cal.* 463.

43. A bill in equity is multifarious when several matters are united against one defendant, which are perfectly distinct and unconnected, or when relief is demanded against several defendants of several matters of a distinct and independent nature. (*Wilson v. Castro*, 31 *Cal.* 420.) So, in an action against trustees of two separate estates. *Vial v. Mott*, 37 *Barb.* 208.

44. An action against a sheriff and his official bondsmen, alleging only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, is a misjoinder of causes of action. (*Ghirardelli v. Bourland*, 32 *Cal.* 585.) So, a lessee and his surety cannot be united in the same suit. *Phalen v. Dingee*, 4 *E. D. Smith*, 379; *Tibbetts v. Perey*, 24 *Barb.* 39.

45. It is held in New York, that the payee of a note to order, cannot claim to recover against both maker and endorser in the same action. (*Young v. Knapp*, 7 *Abb. Pr.* 399.) He cannot sue even the endorser until he himself first endorse it without recourse, and take the endorsement of a third party as the source of his title. (*Waterbury v. Sinclair*, 7 *Abb. Pr.* 400.) A husband and wife may join in suit for her services, but when they sue together he cannot join a claim of his own. (*Avogadro v. Bull*, 4 *E. D. Smith*, 384.) A suit by an infant coming of age, seeking to avoid two separate grants to different persons, and to recover possession, cannot be brought in one action. *Voorhies v. Voorhies*, 24 *Barb.* 150.

46. Count on contract made by one defendant cannot be joined with one made by all defendants. (*Moore v. Platte Co.*, 8 *Mo.* 467; *Doane v. Holly*, 25 *Mo.* 357; *Doane v. Holly*, 26 *Id.* 186.) Two claims, the one against both defendants for recovery of possession of real estate and damages, the other against one only for rents received, no connection existing between the same, cannot be joined. *Tompkins v. White*, 8 *How. Pr.* 520.

47. A complaint setting forth a liability on the part of the defendant, partly joint and partly several, is fatally defective. (*Lewis v. Acker*, 11 *How. Pr.* 163.) Or a claim arising out of joint liability on contract, with claim for joint and several liability sounding in tort. (*Harris v. Schultz*, 40 *Barb.* 315.) Nor can an action be maintained against a defendant as sole debtor on one contract and joint debtor on another. (*Barnes v. Smith*, 16 *Abb. Pr.* 420; *Warth v. Radde*, 28 *How. Pr.* 230; 15 *Abb. Pr.* 396.)

48. A suit on a recognizance given before a justice, for the appearance of the defendant to answer a criminal charge. The complaint, after setting out the cause of action on the recognizance avers that the defendant, S., to secure his sureties, executed a trust deed to T. of certain warrants and money. This deed provides that in case the recognizance be forfeited, and the sureties become liable thereon, the trustee is to apply the property to the payment thereof, so far as it will go. The complaint asks to have this property so applied. It is a misjoinder of causes of action, the trust deed having nothing to do with liability of the sureties. *The People v. Skidmore*, 17 *Cal.* 260.

SPLITTING DEMANDS.

49. A creditor has not the right to assign the debt in parcels, and thus by splitting up the cause of action, subject his debtor to costs and expenses of several suits. (*Marziou v. Pioche*, 8 *Cal.* 536; but see *McEwen v. Johnson*, 7 *Cal.* 260; *C. Cushing R.* 282; 13 *Mo. R.* 300; 11 *S. & R.* 78; *N.Y. Code*, 182.) So, a promissory note cannot be the foundation of two suits, each for a part of the note. *Miller v. Covert*, 1 *Wend.* 487.

50. There is no case or dictum requiring a party to join in one action several distinct causes of action. The plaintiff may elect to sue upon them separately; (*Phillips v. Beruk*, 16 *Johns.* 140; *Secor v. Sturgis*, 16 *N. Y.* 554;) even when they belong to the same family of causes, provided their identity is not the same. *Staples v. Goodrich*, 21 *Barb.* 317.

51. An attorney suing for services must include his entire demand in one action. (*Beekman v. Platner*, 15

Barb. 550.) So, a joint cause of action vested in two or more, cannot be split. (*Coster v. N.Y. & E. R.R. Co.*, 6 *Duer*, 46.) But any demand may be split with the consent or assent of the defendant. *Cornell v. Cook*, 7 *Cow.* 310; *Secor v. Sturgis*, 16 *N.Y.* 559.

52. As to bringing action for one of several demands arising out of same transaction being a bar to the subsequent assertion of others (15 *Johns.* 229; 16 *Id.* 136; 19 *Wend.* 207; 8 *Id.* 492; 15 *Id.* 557; 4 *McCord*, 20; 1 *Wend.* 487; see *Hopf v. Meyers*, 42 *Barb.* 270.) In a suit in trover for the recovery of bedquilts, when bed and bedquilts were taken at the same time, a recovery of the quilts was a bar to an action for the recovery of the bed. (*Farrington v. Payne*, 15 *Johns.* 432.) So, an action for the recovery of one barrel of potatoes was a bar to a suit for the recovery of two barrels, all sold at the same time. (*Smith v. Jones*, 15 *Johns.* 229.) So, in case of sale of hay under a contract, to be delivered in parcels. *Miller v. Covert*, 1 *Wend.* 487.

53. Judgment in an action for a breach of one covenant of a lease, is a bar to a recovery on the breach of another covenant in the same lease, committed before the first suit was commenced. *Bendernagle v. Cocks*, 19 *Wend.* 207; *Fish v. Folley*, 6 *Hill.* 54; *Crain v. Beach*, 2 *Barb.* 120; *Stuyvesant v. Mayor of N.Y.*, 11 *Paige*, 414; *Coggins v. Bulwinkle*, 1 *E. D. Smith*, 434.

ACTIONS FOR DEBT.

54. A debt is a sum of money due upon a contract, express or implied. (*Perry v. Washburne*, 20 *Cal.* 350.)

Standing alone, the word "debt" is as applicable to a sum of money which has been promised at a future day, as to a sum now due and payable. But a sum of money payable on a contingency does not become a debt till the contingency has happened. (*People v. Arguello, Cal. Sup. Ct., Jul. T., 1869.*) So, the wages of a seaman is not a debt till the vessel has arrived. (*Wentworth v. Whitmore, 1 Mass. 471.*) So of a contract between shippers and owners, which does not become a debt till the termination of the voyage. (*Davis v. Ham, 3 Mass. 33; Frothingham v. Haley, Id. 68.*) So of a covenant to pay rent quarterly, from which the tenant is liable to be discharged by quitting the premises or by assigning the term, with lessor's consent, or the lessee may be evicted therefrom by title paramount. (*Wood v. Partridge, 11 Mass. 488.*) But a debt payable *in any event*, but not yet due, is a debt, *debitum in presenti, solvendum in futuro*. *People v. Arguello, Cal. Sup. Ct., Jul. T., 1869.*

55. The action of debt lies to recover a certain specific sum of money, or a sum that can be readily reduced to a certainty. (*1 Burr. Law Dict. 450; 3 Bl. Com. 154; 3 Steph. Com. 461; 1 Tidd's Pr. 3; 1 Archb. Nisi. Prius. 200; Browne on Actions, 333; Smith on Contracts, 297.*) It is a species of contract whereby a right to a certain sum of money is mutually acquired and lost. (*2 Bl. Com. 464.*) Or, more properly, the *result* of such contract. (*2 Steph. Com. 187.*) Counts in *indebitatus assumpsit*, heretofore known as the common counts, may be stated separately, or may be all united in the same complaint. It is only necessary to aver an indebtedness, and that said indebtedness has not been paid.

56. The action of debt is founded upon contract, the action of *assumpsit*, upon the promise. (*Metcalf v. Robinson*, 2 *McLean*, 363.) An action of debt founded on a statute is considered as an action founded on a specialty, but it is not of equal dignity with a debt due by bond. *United States v. Lyman*, 1 *Mass.* 482.

57. The action of debt will lie in general where the sum is certain, and it is the duty of the defendant to pay the amount to the plaintiff. (*Home v. Semple*, 3 *McLean*, 150; *Bank of Circleville v. Iglehart*, 6 *McLean*, 568.) But it may also be brought for a sum capable of being certainly ascertained, though not ascertained at the time of action brought. *United States v. Colt, Pet. C. Ct.* 145.

58. *Indebitatus assumpsit* lies to recover the stipulated price due on a contract not under seal, where the contract has been completely performed. (*Fitzg.* 303; 4 *East*, 147; 4 *Bos. & P.* 351; 6 *East*, 564; 2 *Saund.* 350; *Bank of Columbia v. Patterson*, 7 *Cranch*, 299; *Chesapeake Canal Co. v. Knapp*, 9 *Pet.* 541; *Hyde v. Liverse*, 1 *Cranch. C. Ct.* 408; *Maupin v. Pic.* 2 *Id.* 38; *Brockett v. Hammond*, 2 *Id.* 56; *Pipsico v. Bontz*, 2 *Id.* 425; to the contrary, *Krouse v. Deblois*, 1 *Cranch. C. Ct.* 138; *Talbot v. Selby, Id.* 181.

59. **Covenant.**—The action of covenant lies where a party claims damages for a breach of covenant, that is, of a promise under seal, as distinguished from actions of *assumpsit* or for breach of contracts not under seal. *Steph. Pl.* 18.

60. **Judgments and Decrees.**—The action of debt lies upon a judgment. (*Stuart v. Lander*, 16 *Cal.* 372; see, also, *Ex parte Prader*, 6 *Cal.* 239; *Lawrence v. Martin*, 22 *Cal.* 173; *Pennington v. Gibson*, 16 *How. U.S.* 65.) Or on a decree. *Pennington v. Gibson*, 16 *How. U.S.* 65; *Thompson v. Jameson*, 1 *Cranch.* 282.

61. Note.—Debt lies where *indebitatus assumpsit* would lie. (1 *Salk.* 23; *Doug.* 1; 1 *Ld. Raym.* 69.) And an indorsee of a note can have debt against the maker. (12 *Johns.* 90; *Willmarth v. Crawford*, 10 *Wend.* 341.) Or against a remote endorser. *Onondaga Co. Bank v. Bates*, 3 *Hill.* 53.

62. Penalty.—The action of debt lies on a penalty, whether it be a statutory penalty, although uncertain; (*United States v. Colt*, *Pet. C. Ct.* 145;) if the duty or penalty be capable of being reduced to a certainty; (*Bullard v. Bell*, 1 *Mas.* 243;) or for the penalty of an agreement. (*Martin v. Taylor*, 1 *Wash. C. Ct.* 1.) And in the latter case, a sum less than the penalty may be recovered. *Id.*

63. Rent.—An action of debt lies to recover rent on an expired lease. (*Cro. Eliz.* 633; 1 *Lev.* 25; 2 *Id.* 231; 1 *Saund.* 233; *Woodf.* 323; *Norton v. Vultee*, 1 *Hall*, 384.) And so where there is a demise not under seal, whether against lessee or lessee's assignee, debt for use and occupation will lie. *McKeon v. Whitney*, 3 *Den.* 452.

DAMAGES FOR BREACH OF CONTRACTS.

64. The requisites which must carefully be observed in a complaint on contracts are, *First*, The existence of the contract sued upon, and its terms clearly shown upon the face of the pleading. *Second*, Performance or readiness to perform, and a tender of performance on the part of the plaintiff, must be shown. *Third*, The breach must be clearly apparent. *Fourth*, Special damages resulting from the breach must be specifically and clearly averred.

CONTRACT SHOULD BE CLEARLY SHOWN.

65. The existence of the contract should be stated, and if it was an alternative or a conditional engagement or qualified by exceptions, this should appear in the complaint. *Hatch v. Adams*, 8 *Cow.* 35; *Stone v. Knowlton*, 3 *Wend.* 374; *Lutweller v. Linnell*, 12 *Barb.*

512; *Roget v. Meritt*, 2 *Cal.* 117; *Crane v. Maynard*, 12 *Wend.* 408.

66. If the contract be in writing, it may be pleaded in *hæc verba*, or the pleader may set forth its legal effect. The former mode, however, is preferable as being more consistent with the present system of pleading. (See *Stoddard v. Treadwell*, 26 *Cal.* 300.) The rule which permits the pleader to declare upon a contract in *hæc verba*, must be limited to cases where the instrument set out contains the formal contract, showing in express terms the promises and undertakings on both sides. *Joseph v. Holt*, *Cal. Sup. Ct., Apl. T.*, 1869.

67. It is by far the better practice to plead a contract, if it be a written contract, by setting forth a copy of it or by annexing a copy to the complaint (*Fairbanks v. Bloomfield*, 2 *Duer*, 349), the same as in actions upon written instruments for the payment of money only. (*Swan on Pl.* 204.) If declared on according to its legal effect, the defendant may, by the rule of the common law in a proper case, crave *oyer* of the instrument; and if it appears that its provisions have been misstated, he may set out the contract in *hæc verba*, and demur on the ground of the variance. *Stoddard v. Treadwell*, 26 *Cal.* 300.

68. It is not necessary that the words of a deed or other written instrument should be given; the substance is sufficient. But whatever is pleaded should be truly pleaded. (*Ferguson v. Harwood*, 7 *Cranch*, 408.) For where a pleading purports to recite a deed or record in *hæc verba* trifling variances, if material, have been deemed fatal. *Id.*

69. Records and papers cannot be made a part of a pleading by merely referring to them, and praying that they may be taken as a part of such pleading, without annexing the originals or copies as exhibits, or incorporating them, so as to form a part of the record in the cause. (*People v. De la Guerra*, 24 *Cal.* 78.) The party by pleading a record with the words, "as appears by the record," or "as appears of record," proffers that issue, and it is incumbent on him to maintain it literally; and this is true where the averment has reference to particulars which need not, as well as to those which must be specifically stated upon the record. (9 *East*, 160; *Whittaker v. Bramson*, 2 *Paine*, 209.) In an action of foreclosure, where the complaint has a copy of the mortgage annexed, and to which it refers, a correct description of the land in the mortgage is sufficient for the purpose of the suit. *Emeric v. James*, 6 *Cal.* 155.

70. If time is stated, it should be when the debt became due, though time is only material when it is sought to recover interest. (*Lyon v. Clark*, 4 *Seld.* 148.) In an action on the case for failure to perform a parol contract, the time of making it is not material. (*Scull v. Higgins*, *Hempst.* 90; compare *McLaughlin v. Turner*, 1 *Cranch. C. Ct.* 476.) The plaintiff may in fact allege any time after the debt accrued, and give evidence of the true time. *Moffet v. Sacket*, 18 *N.Y.* 522; *Tarran v. Sherwood*, 17 *N.Y.* 227.

71. If the time of performance is not stated, the law imports a reasonable time therefor. (*Fickett v. Brice*, 22 *How. Pr.* 194.) In *assumpsit* on a promise to pay a debt due by the promissor, if the plaintiff would give

time, whenever the promissor should be able, the declaration need not state that the plaintiff accepted the promise. It is sufficient to aver that time was given and the ability of the defendant. *Lonsdale v. Brown*, 4 *Wash. C. Ct.* 148; compare *Rice v. Barry*, 2 *Cranch. C. Ct.* 447.

72. Although the form of action of *assumpsit* and of pleadings therein have been abolished, yet the distinction between an express and implied *assumpsit* remains, and it is only on the theory of an implied *assumpsit*, "inferred from the conduct, station, or mutual relation of the parties," that justice can be enforced and the performance of a legal duty compelled. It is no longer necessary in such a case, for the plaintiff to allege in his complaint any promise on the part of the defendant; but he must state facts which if true according to well settled principles of law, would have authorized him to allege and the Court to infer a promise on the part of the defendant in a case in *assumpsit*. *Swan's Pl.* 174; *Farron v. Sherwood*, 17 *N.Y.* 227; *Byxbie v. Wood* 24 *Id.* 607; *Berry v. Fernandez*, 1 *Bing.* 338; *Dunford v. Messiter*, 5 *M. & S.* 446.

73. The allegation that the defendant "made his contract in writing," imports a delivery (*Prindle v. Caruthers*, 15 *N.Y.* 425), and this need not ordinarily be alleged. (*Cro. Eliz.* 178; *Cro. Jac.* 420; 2 *Ld. Raym.* 1,538; *Churchill v. Gardiner*, 7 *T. R.* 596; *Brinkerhoff v. Lawrence*, 2 *Sandf. Ch.* 400; *Peets v. Bratt*, 6 *Barb.* 660; *Brinkerhoff v. Lawrence*, 2 *Sandf. Ch.* 400; *Cecil v. Butcher*, 2 *Jac. & W.* 571; *Tompkins v. Corwin*, 9 *Cow.* 255.) Nor need it be alleged that it was accepted. (*Gazley v. Price*, 16 *Johns.* 267. Ex-

ceptions however exist to this rule, as in case of instruments in trust for benefit of others, where delivery should be alleged. *Whitlock v. Fiske*, 3 *Edw.* 131.

74. A grantor handed a deed purporting to convey land to his son to a third party, saying: "Here is a writing in [my son's] favor. It is for him, but I don't want him to have it in his hands just now; I want you to take it and keep it in your possession till a proper time to produce it. If I keep it in my hands I don't know who will get hold of it," and gave his reasons: there was no privity between the depository and the grantee. On the death of the grantor, *held*, that there had been no delivery. *Baker v. Haskell*, 47 *N. H.* 479.

PROMISE.

75. If there is an express promise, it should be properly alleged and proved. In such case the promise is the fact constituting the cause of action. But if the promise is implied from the other facts alleged, it need not be averred. And in the absence of an express promise, every fact essential to fix the liability of the defendant should be stated; for where the plaintiff does not allege in his pleadings a contract or agreement, he cannot recover upon it. *Irwin v. Schultz*, 46 *Penn.* 74.

76. A party who has wholly performed a special contract on his part, may count upon the implied agreement of the other party to pay the stipulated price; and is not bound to specially declare upon the agreement. 3 *Seld.* 476; 19 *N.Y.* 231; 18 *Id.* 522; 28 *N.Y.* 438; *Hosley v. Black*, 26 *How. Pr.* 97.

77. A complaint upon an undertaking to answer for

the debt of a third person, is good, though it does not allege that either the promise or the consideration was in writing. (*State of Indiana v. Woram*, 6 *Hill*, 33; and also in *Wakefield v. Greenhood*,) where it is *held* that the contract must be in writing under a statute, yet it is not necessary in the complaint to show that fact. But consult, also, *Thurman v. Stevens*, 2 *Duer*, 609; and *Le Roy v. Shaw*, *Id.* 626.

78. In pleading a contract which the Statute of Frauds requires to be in writing, *e.g.*, a contract relating to lands—it is not necessary to allege the facts relied on to take the case out of the Statute. It is sufficient, on demurrer, to allege that a contract was made. Such an allegation is to be understood as intending a real contract—something which the law would recognize as such. There is no reason for departing, under the Code, from the former well-settled rules in law and equity. (*Elting v. Vanderlyn*, 4 *Johns.* 237; *Myers v. Morse*, 15 *Id.* 425; *Cozine v. Graham*, 2 *Paige*, 177.) The existence of a writing in such case is a matter of evidence; it is not one of the pleadable facts. *Livingston v. Smith*, 14 *How. Pr.* 490.

CONSIDERATION.

79. The essential element of every contract being the consideration, a proper statement in the complaint becomes a matter of great importance, while an averment of consideration in cases where it is implied by law, becomes surplusage, and should be avoided. The rule, however, is, that the consideration must appear on the face of the complaint, either impliedly, as in cases

of sealed instruments, where the seal imports consideration; (*John* 416; *Willis v. Kempt*, 17 *Cal.* 98; *McCarty v. Beach*, 10 *Id.* 461;) or the particular consideration on which the contract is founded must be expressly stated (1 *Chitt. Pl.* 293; 2 *McCord*, 218; *Kean v. Mitchell*, 13 *Mich.* 207; and cases there cited,) whenever proof of it is necessary to support the action (4 *Johns.* 280), for in its absence no cause of action can be maintained. 9 *Barb. U.S.* 158.

80. In suit upon an agreement under seal, the complaint setting out the agreement in *hæc verba* need not aver any consideration for the agreement. The seal imports a consideration. (*Willis v. Kempt*, 17 *Cal.* 98; *McCarty v. Beach*, 10 *Id.* 461.) But on a simple contract the law of pleading requires the complaint to state the particular consideration for the defendant's promise declared on. (*Moore v. Waddle*, 34 *Cal.* 145; *Joseph v. Holt*, *Cal. Sup. Ct., Apl. T.*, 1869.) And in all cases when the performance of the consideration is a condition precedent. (*Moore v. Waddle*, 34 *Cal.* 145.) This rule has its exceptions, as in cases of bills of exchange and promissory notes, where the consideration is implied. *Id.*; 7 *N.Y. Leg. Obs.* 149.

81. To constitute a valuable consideration it is not necessary that money should be paid. It is sufficient that it has been expended on the faith of the contract. (*King v. Thompson*, 9 *Pet.* 204.) The acknowledgment of one dollar is sufficient, whether actually paid or not. (5 *Bing. N. C.* 577; *Lawrence v. McCalmont*, 2 *How. U.S.* 426.) It has been held that the allegation of a "good and valuable consideration" is not sufficient on demurrer, or to sustain a judgment by default; yet it

is sufficient to sustain a verdict after trial upon the issues. *Kean v. Mitchell*, 13 *Mich.* 207.

82. If part of a consideration be merely void, the contract may be supported by the residue, if good *per se*. But if any part be *illegal*, it vitiates the whole. (1 *Sand. Pl. and Ev.* 187; *Cobb v. Cowdery*, 40 *Vt.*) It is no objection that the direct consideration moves to a third person. (*Townley v. Sumrall*, 2 *Pet.* 170; but compare *D'Wolf v. Rabaud*, 1 *Id.* 476.) Nor is it an objection that it moves from a third party to the person who seeks to enforce it. *Raymond v. Pritchard*, 24 *Ind.* 318.

83. The consideration must in all cases be legally sufficient to support the promise for the breach of which the action is brought. (1 *Chitt. Pl.* 292; *Bristol v. Van Rensselaer and Saratoga R.R. Co.*, 9 *Barb.* 158.) If there is a benefit to the defendant and a loss to the plaintiff directly resulting from the promise in behalf of the plaintiff, there is a sufficient consideration to enable the latter to maintain an action. (2 *Add. on Cont.* 1,002; *Emerson v. Slater*, 22 *How. U.S.* 43.) The Court will not inquire into the exact proportion between the value of the consideration and that of the thing to be done for it. 1 *Pars. on Cont.* 362; and authorities there cited.

84. The recital in a complaint of an executed or past consideration is not usually traversable, and requires little certainty either of name, place, person, or subject matter. (*Gebhart v. Francis*, 32 *Penn.* 78.) Although it should be known to both parties at the time of making the contract that the subject matter is liable to a contin-

gency by which it may be destroyed. If this contingency has already happened at the time, the agreement is without consideration. *Dan. 1; Allen v. Hammond, 11 Pet. 63.*

85. However strong may be one's moral obligation to do that which he agreed to do, it is only promises founded on the performance of duties actually agreed to be done, or imposed by law, which are regarded in law as binding. A promise by a party to do what he is bound in law to do, is an *insufficient, but not* an illegal, consideration. *Cobb v. Cowdery, 40 Vt.*

86. In contracts imposing a restraint on one of the parties contracting, there must not only be a consideration for the contract, but some good reason for entering into it, and it must impose no restraint upon one party which is not beneficial to the other. *Cal. Steam Nav. Co. v. Wright, 6 Cal. 258.*

PERFORMANCE OF CONDITIONS.

87. If the promise depended on the performance by the plaintiff of conditions precedent, as in actions on a promissory note, presentment and demand, and notice of non-payment by the drawer to charge the indorser, which formerly were specifically pleaded, may now be generally averred. See *Cal. Pr. Act, § 60; N.Y. Code, § 162; 1 Van Santv. 234; Nevada Code, § 60; Idaho, § 60; Arizona, § 60; Oregon, § 86; Cal. Steam Nav. Co. v. Wright, 6 Cal. 258; Owens v. Geiger, 2 Mo. 39; Rowland v. Phalen, 1 Bosw. 44; Wood v. Lilly, N.Y. Sup. Ct. not reported; Adams v. Sherrill, 14 How. Pr. 299.*

88. The purpose of the Statute is to avoid prolixity by permitting the plaintiff to aver generally, by grouping all the conditions to be performed by himself in a general averment that he has duly performed them all. (*Woodbury v. Sackrider*, 2 *Abb. Pr.* 402; *Graham v. Machado*, 6 *Duer*, 515; *Rowland v. Phalen*, 1 *Bosw.* 43.) And it is a sufficient averment to allege that he had "fully and faithfully" performed the said contract on his part. *Rowland v. Phalen*, 1 *Bosw.* 44.

89. This general allegation of performance is confined to cases of contracts on instruments valid on their face (*Spear v. Downing*, 34 *Barb.* 523), since in all other cases the facts showing a performance must be specifically alleged. *People v. Jackson*, 24 *Cal.* 632; *Hatch v. Peet*, 23 *Barb.* 580; *Couch v. Ingersoll*, 2 *Pick.* 292; *Kane v. Hood*, 13 *Id.* 281; *Pomroy v. Gold*, 2 *Met.* 500.

90. It seems that the word *party*, in the provision of the Code, that "it may be stated generally that the *party* duly performed all the conditions on his part," means the person or persons *by whom* the conditions were to be performed, and the plaintiff in the suit is not necessarily the person who is the party to the contract. Upon a liberal construction, the statute means, that it may be stated generally that the person or persons by whom the conditions were to be performed, have duly performed, etc. *Rowland v. Phalen*, 1 *Bosw.* 43.

91. In an action on a contract by which the plaintiff had bound himself to do certain acts, and to procure third parties to do certain acts, the complaint alleged performance on their part, in the following form: And

the plaintiff further says, that he and those on whose behalf the agreement was made and entered into by him, have fully and faithfully performed and fulfilled all and singular the covenants and agreements in the said agreement contained, on the part of the said plaintiff and those on whose behalf the said agreement was made and entered into by him, as aforesaid, was held sufficient. (*Rowland v. Phalen*, 1 *Bosw.* 43.) Such general averment imports a sufficient statement of being ready to do all things necessary in the future. *Williams on Pl.* 117, n.; *Bentley v. Dawes*, 9 *Exch.* 666.

92. Where certain work was to be done by the defendant, for the Government, and certain things were to be done by the plaintiff to enable the defendant to perform his contract; the declaration must show that the precedent acts were done, by the Government, according to the terms of the contract. *United States v. Beard*, 5 *McLean*, 441; compare *Hart v. Rose*, *Hempst.* 238.

93. Performance must be averred according to the intent of the parties. Thus, a vendor of land, who sues upon an agreement of sale, containing a covenant on his part that he "will make a deed for the property," must aver and prove not merely his readiness to "deliver a deed," but that he had a good title, free of incumbrance, which he was ready and willing to convey by a legal deed. *Washington v. Ogden*, 1 *Black. U.S.* 450; *Prewett v. Vaughn*, 21 *Ark.* 417.

94. In an action of covenant on a contract to deliver merchandise at any place, between certain points on a river, to be designated by the party to

whom the delivery was to be made, the omission of such party to designate the place did not prevent the other from making a delivery at any convenient point he might select. The declaration need not aver that a place of delivery was designated, nor that notice of a place for the delivery of the merchandise was given. An issue formed as to such notice is immaterial. *Hartfield v. Patton*, *Hempst*, 268.

95. An averment of performance is always made in the declaration upon contracts containing undertakings; and that averment must be supported by proof. (*Bank of Columbia v. Hagner*, 1 *Pet.* 455; *United States v. Arthur*, 5 *Cranch. U.S.* 257; compare *Beale v. Newton*, 1 *Cranch. C. Ct.* 404; *Savary v. Goe*, 3 *Wash. C. Ct.* 140.) In pleading title to land under an act of the Legislature which prescribes conditions upon the performance of which the title may be recovered, it is necessary to aver a performance of all the acts required by the statute. *People v. Jackson*, 24 *Cal.* 632.

NON-PERFORMANCE.

96. When performance is impracticable, such fact may be shown under an excuse for non-performance. (*Wolf v. Howes*, 24 *Barb.* 174, 666.) As from sickness or death. (*Id.*; *Faby v. North*, 19 *Barb.* 341.) Or by act of law. (*Jones v. Judd*, 4 *Comst.* 411.) Or by casualty of fire. (*Lord v. Wheeler*, 1 *Gray*, 282.) In such cases, the excuse for non-performance must be shown. *Newcomb v. Brackett*, 16 *Mass.* 166; *Baker v. Fuller*, 21 *Pick.* 318.

97. If performance has been prevented or inter-

rupted by act of the adverse party, or where a waiver thereof may be inferred, an averment of facts constituting the excuse is sufficient. For example, see (*Clark v. Crandall*, 3 *Barb.* 612; *S. C.* 27 *Id.* 73; *Garvey v. Fowler*, 4 *Sandf.* 665; *Crist v. Armour*, 34 *Barb.* 378; *Rhivara v. Ghio*, 3 *E. D. Smith*, 264; *Little v. Mercer*, 9 *Mo.* 216; *Shultz v. Dupuy*, 3 *Abb. Pr.* 252; compare *Smith v. Brown*, 17 *Barb.* 431.) In such cases performance need not be alleged. *Oakley v. Morton*, 1 *Kern.* 33; *Hosley v. Black*, 26 *How. Pr.* 97; *Holmes v. Holmes*, 5 *Seld.* 525.

98. Where the conditions contained in the contract have been modified, or plaintiff has become excused from them, an averment of performance is not proper; the modification or excuse should be stated. (*Oakley v. Morton*, 11 *N.Y.* 25.) For under a complaint setting out a contract, and averring its performance by the plaintiff, evidence in excuse for non-performance is not admissible; yet this rule becomes of little importance in view of the power of amendment given to the Court by the Code. (*Cal. Pr. Act*, § 43; § 173 of the *N.Y. Code*; *Hosley v. Black*, 26 *How. Pr.* 97.) Of the rule requiring full performance, except where sufficient excuse is shown, see (*Wolfe v. Howes*, 20 *N.Y.* 197.) And that no recovery can be had for part performance of conditions precedent, consult 14 *Wend.* 257; 12 *Johns.* 165; 19 *Id.* 337; 8 *Cow.* 63; 1 *Kern.* 25.

CONCURRENT ACTS.

99. In an action for breach of contract, the performance of a concurrent act, which the contract expressly, or by implication, devolved on the plaintiff, must be

averred. (*Lester v. Jewett*, 1 *Kern*. 453; *Considérant v. Brisbane*, 14 *How. Pr.* 487.) So, where the contract is executory, a performance, or tender of performance, or a readiness and willingness to perform, on the part of the plaintiff, must be shown in the complaint. *Barron v. Frink*, 30 *Cal.* 486; *Van Schaick v. Winne*, 16 *Barb.* 94; *Beecher v. Conratt*, 3 *Kern*. 110; *Bronson v. Wiman*, 4 *Seld.* 188; *Tinney v. Ashley*, 15 *Pick.* 546; *Dunham v. Pettee*, 8 *N.Y.* 508; and *Smith v. Wright*, 1 *Abb. Pr.* 243.

100. A tender of performance, or a readiness and willingness to perform, is a substitute for the general allegation of performance in such cases as it may be required. It may also be alleged that the plaintiff offered to perform. (See *Williams v. Healy*, 3 *Den.* 363; *Crandall v. Clark*, 7 *Barb.* 169; *Clark v. Crandall*, 27 *Id.* 773.) In England, a general averment of readiness and willingness is sufficient. (*Rust v. Nott-ridge*, 1 *Ellis & Bl. (Q. B.)* 99; so, also, in *Bentley v. Dawes*, 9 *Exch. (Welsb. H. & G.)* 666.) So, also, in Ohio. (*Swan on Pl.* 206; *Nathan v. Lewis*, 1 *Handy*, 242.) And such tender or offer of performance must be proved. *Goodwin v. Lynn*, 4 *Wash. C. Ct.* 714.

101. In cases where the performance on the part of the plaintiff depends upon acts previously to have been done on the part of the defendant, an averment of readiness and willingness will be sufficient. (*West v. Emmons*, 5 *Johns.* 179.) So, where there are mutual promises, not dependent on each other, the omission to state in the declaration performance of that made by the plaintiff, is cured by the verdict. *Corcoran v. Dougherty*, 4 *Cranch. C. Ct.* 205.

102. If mutuality exists at the inception of the contract, or at the time the contingency happens, no subsequent changes can destroy the contract, if the party has performed all the conditions on his part. (*Sugd. on Vend.* 194; 1 *Ves.* 218; 10 *Ves. Jr.* 315; 1 *Schoales & L.* 19; *Walton v. Coulson*, 1 *McLean*, 120.) In an executory contract for the sale of an article to be paid for on delivery, the obligation of one party to pay, and the other to deliver, are mutual and dependent; and the seller must show that he was ready and offered to deliver the goods. (*Barron v. Frink*, 30 *Cal.* 486; *Gibbons v. Scott*, 15 *Cal.* 284; 1 *Sand. Pl. & Ev.* 190; *Kelly v. Upton*, 5 *Duer*, 336; *McKnight v. Dunlop*, 4 *Barb.* 36; *Cornwall v. Haight*, 8 *Id.* 328; *Crandall v. Clark*, 7 *Id.* 169; *Lester v. Jewett*, 12 *Barb.* 502; *Faucher v. Goodman*, 29 *Id.* 316; *Considérant v. Brisbane*, 14 *How. Pr.* 487; *Dunham v. Pettee*, 4 *E. D. Smith*, 500; *Fickett v. Brice*, 22 *How. Pr.* 194; *Smith v. Wright*, 1 *Abb. Pr.* 243.) But where there has been part performance, a special allegation is not necessary. *Grant v. Johnson*, 5 *Barb.* 161; *Wallace v. Warren*, 18 *Law Jour. Rep. Ex.* 449; 14 *Law Times*, 108; 7 *Dowl. & L.* 60; 4 *Ex.* 364.

103. In cases where mutuality exists in the conditions of a contract, neither party can maintain an action against the other for a breach of contract, without showing performance or tender of performance on his part. 12 *Johns.* 209; 16 *Id.* 267; 20 *Id.* 130; 5 *Cow.* 404; 11 *Wend.* 67; 3 *Den.* 363; 12 *Barb.* 502; 11 *N.Y.* 453; 15 *Barb.* 359; 16 *Id.* 89; 21 *Id.* 324; 2 *N.Y.* 408; 8 *Id.* 508; 1 *Saund.* 320; 2 *Pick.* 155; *Fickett v. Brice*, 22 *How. Pr.* 194; to the same effect, *Frey v. Johnson*, *Id.* 316.

104. But where the covenants of an agreement are independent, the plaintiff cannot support his action as to them without showing performance of every affirmative covenant on his part, and in such a case it is competent to the defendant to prove a breach of such as are negative. *Webster v. Warren*, 2 *Wash. C. Ct.* 456.

105. **Assignment.**—Where it was agreed that plaintiff, in consideration of the payment of a certain sum and the delivery of certain notes on a certain day, would make a certain assignment to defendant, plaintiff need not allege performance or offer of performance. *Smith v. Betts*, 16 *How. Pr.* 251.

106. **Notice.**—If *notice* is necessary to give a right of action, such notice must be specially averred. (*Bensley v. Atwill*, 12 *Cal.* 231; *Colt v. Root*, 17 *Mass.* 229; *Hobart v. Hilliard*, 11 *Pick.* 144.) And an averment of facts “which defendants well knew,” is not sufficient. *Colchester v. Brooks*, 7 *Q. B.* 339; *S. C.*, 53 *Eng. Com. L. R.* 339.

107. **Request.**—Whenever a request is necessary to give a party a right to sue, it must be specially averred. *Ramsey v. Waltham*, 1 *Mo.* 395.

108. **Statute Requirements.**—Where the statute prescribes conditions precedent to the acquirement of a right, the performance of those conditions must be specifically averred, and the facts showing such performance must be pleaded. *People v. Jackson*, 24 *Cal.* 632.

109. **Tender.**—In an action by purchaser to recover money paid in part execution of a contract rescinded by the vendor, an allegation of tender or readiness to pay the whole price is not necessary. (*Main v. King*, 8 *Barb.* 535; *Faucher v. Goodman*, 29 *Id.* 316; *McKnight v. Dunlop*, 4 *Id.* 36.) So, on a contract for wheat to be delivered on demand, it was not necessary to aver a tender. (*Crosby v. Watkins*, 12 *Cal.* 85.) And under an averment of tender, the plaintiff may prove a waiver of it by defendant. *Holmes v. Holmes*, 5 *Seld.* 525.

THE BREACH MUST BE CLEARLY APPARENT.

110. A complaint for breach of a contract must state a breach in unequivocal language. (1 *Van Santv.* 222; *Moore v. Besse*, 30 *Cal.* 570; *Schenck v. Naylor*, 2 *Duer*, 675; *Van Schaick v. Winne*, 16 *Barb.* 89.) A general allegation, however, will be sufficient to admit proof, and will only be obnoxious to a motion to render it more certain. *Trimble v. Stilwell*, 4 *E. D. Smith*, 512.

111. Where the covenant describes a specific act, the breach may be averred in the language of the covenant; but if a number of acts are included in one phrase, the complaint must set forth the breach of each particular act upon which the plaintiff relies, with particularity. (*Wolfe v. Luyster*, 1 *Hall*, 146; *Brown v. Stebbins*, 4 *Hill*, 154.) For when a party relies upon any breaches of an agreement as the foundation of an action, he must set forth in his pleading sufficient of the agreement to make it appear to the Court that the breaches complained of do actually exist, and to what extent. *Lynch v. Murray*, 21 *How. Pr.* 154.

112. If the promise contained an exception or *proviso*, it must be stated. (2 *B. & C.* 20; 4 *B. & C.* 446; 4 *Camp.* 20.) And, on a contract containing various undertakings, the plaintiff complaining of the breach of one, thereby waives any right as to the others. *Chinn v. Hamilton*, *Hempst.* 438.

SPECIAL DAMAGES AVERRED.

113. For the breach of a contract an action lies, though no actual damages be sustained. (*McCarty v.*

Beach, 10 *Cal.* 461.) And damages which materially and necessarily arise from the breach of the contract need not be stated, as they are covered by the general damages laid in the declaration; but special damages must be specially stated. (*Bas v. Steele*, 3 *Wash. C. Ct.* 381.) It is sufficient, so far as the demurrer is concerned, to aver in the complaint, the contract, the breach complained of, and the general damages. (*Barber v. Cazalis*, 30 *Cal.* 92.) But the omission to aver specially the damages laid in the complaint, is waived by going to trial without objection. *Neary v. Bostwick*, 2 *Hilt.* 514.

114. In action for special damages for injuries, such damages as are the material, although not the necessary result of the injury, must be specially stated, and the facts out of which they arise must be specially averred in the complaint. (*Stevenson v. Smith*, 28 *Cal.* 102; *Cole v. Swanston*, 1 *Cal.* 51; 14 *Wend.* 159; 12 *Id.* 64; 1 *Chitt. Pl.* 371; *Sedg. on Dam.* 67; *Say on Dam.* 315; *Tuolumne Water Co. v. Columbia and Stanislaus Water Co.*, 10 *Cal.* 193.) Thus, a jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. *Dabovich v. Emeric*, 12 *Cal.* 171.

115. When damages are special, and do not necessarily accrue from the act complained of, the facts out of which they arise must be specially averred in the complaint, or they cannot be recovered. (*Stevenson v. Smith*, 28 *Cal.* 102; to the same effect, *Vanderslice v. Newton*, 4 *Comst.* 133; *Bogart v. Burkhalter*, 2 *Barb.* 525; *Laraway v. Perkins*, 10 *N.Y.* 371; *Solms v.*

Lias, 16 *Abb. Pr.* 311; Low *v.* Archer, 2 *Kern.* 282; Moloney *v.* Dows, 15 *How. Pr.* 265; Baldwin *v.* Western R.R. Co., 4 *Gray*, 333; Spence *v.* Meynell, 2 *New Mag. Cas.* 19; Roeder *v.* Ormsby, 13 *Abb. Pr.* 335; Bas *v.* Steele, 3 *Wash. C. Ct.* 381.) As to damages in actions for causing death, see (*Althof v. Wolf*, 2 *Hilt.* 344; 22 *N.Y.* 355; *Curtis v. Rochester and Syracuse R.R. Co.*, 20 *Barb.* 282; *Tilley v. Hudson Riv. R.R. Co.*, 24 *N.Y.* 471; *Lucas v. N.Y. Cent. R.R. Co.*, 21 *Barb.* 245.) For recovery of funeral expenses as special damages, *Gay v. Winter*, 34 *Cal.* 153.

116. The want of any averment of special damage cannot be reached by demurrer. Such averment is only necessary where the right of action itself depends upon the special injury received. (*McCarty v. Beach*, 10 *Cal.* 461.) Matters in aggravation of damages need not be alleged; the *quo animo* may be proved without being pleaded; (*Russell v. MacQuester*, 1 *Camp.* 49; *Slack v. McChesney*, 2 *Yates*, 473; *Wallis v. Mase*, 3 *Binney*, 546; *Kan v. McLaughlan*, 2 *Serg. & R.* 469; 2 *Star. N.P.* 56;) and therefore should not be pleaded. *Warne v. Croswell*, 2 *Stark. R.* 457; *Molony v. Dows*, 15 *How. Pr.* 265; see, however, *Root v. Foster*, 9 *How. Pr.* 37; *Brewer v. Temple*. 15 *How. Pr.* 286.

ACTIONS FOR INJURIES RESULTING FROM NEGLIGENCE.

117. Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do. It is not absolute or

intrinsic, but is always relative to some circumstances of time, place, or person. *Richardson v. Kier*, 34 *Cal.* 63.

118. The prudence and propriety of men's actions are not judged by the event, but by circumstances under which they act. If they conduct themselves with reasonable prudence and good judgment, they are not to be made responsible because the event, from causes which could not be foreseen nor reasonably anticipated, has disappointed their expectations. (The "Amethyst," *Daveis*, 20; 2 *N.Y. Leg. Obs.* 312.) Where the safety of human life is in question, a very high degree of care is required. (*Castle v. Duryea*, 32 *Barb.* 480.) But a casualty happening without the will and without the negligence or other default of the party, is, as to him, an inevitable casualty. 1 *T. R.* 27; *Hodgson v. Dexter*, 1 *Cranch. C. Ct.* 109; The "Lotty," *Olc.* 329.

119. Ordinary care or common prudence is such a degree of care and caution as will be in due proportion to the injury or damage to be avoided. (*Ernst v. Hudson Riv. R.R. Co.*, 24 *How. Pr.* 97.) Thus, the question of negligence must depend upon the facts of the case, and is not an abstract question of law. (*Baxter v. Second Av. R.R. Co.*, 30 *How. Pr.* 219; *Welling v. Judge*, 40 *Barb.* 193.) Hence, it will not be necessary in a complaint to aver the degrees of negligence in each case, as they are matters of proof to be decided from the facts stated. *Nolton v. Western R.R. Co.*, 15 *N.Y.* 444; 35 *Barb.* 389.

120. Negligence implies gross as well as ordinary negligence. (*Id.*) And a general averment of negli-

gence is all that is required. (*Oldfield v. N.Y. and Harlem R.R. Co.*, 4 *Kern*. 310.) If an employment requires skill, failure to exert it is culpable negligence, for which an action lies. The "*New World*" *v. King*, 16 *How. U.S.* 469; in which case the theory of the three degrees of negligence is examined.

121. In an action for damages caused by negligence, it must appear that the plaintiff's acts or omissions did not contribute in any degree to the result. (*Wilds v. Huds. Riv. R.R. Co.*, 24 *N.Y.* 430; 24 *How. Pr.* 97; 8 *Com. Bench (N.S.)* 572, 598; *Delafield v. Union Ferry Co.*, 10 *Bosw.* 216.) The rule that, where the act of injury has been caused by the negligence of the party injured, he has no redress, commented on and qualified, (*Richmond v. Sacramento Val. R.R. Co.*, 18 *Cal.* 351;) where it is also held that the negligence which disables a plaintiff from recovering must be a negligence which directly or by natural consequence conduces to the injury.

122. The mutual or co-operating negligence which deprives one party of any right of action against the other, is where the act which produced the injury would not have occurred but for the combined negligence of both. (*Thomas v. Kenyon*, 1 *Daly*, 132.) And it is not necessary to allege in the complaint in an action for damages to either person or property that the plaintiff is without fault (*Wolf v. Supervisors of Richmond*, 11 *Abb. Pr.* 270; 19 *How. Pr.* 370), as it may fairly be presumed that the plaintiff exercised usual care for his own safety. *Johnson v. Hudson Riv. R.R. Co.*, 20 *N.Y.* 65.

123. The right to recover damages for injuries to the person depends upon two concurring facts: *First*, The party claimed to have done the injury must be chargeable with some degree of negligence, if a natural person; if a corporation, with some degree of negligence on the part of its servants or agents. *Second*, The party injured must have been entirely free from any degree of negligence which contributed to the injury. 23 *How. Pr.* 166; *Wilds v. Huds. Riv. R.R. Co.*, 24 *N.Y.* 430; 23 *How. Pr.* 492; reversing S.C., 33 *Barb.* 503.

124. Where negligence consists in the omission of a duty, the facts relied on as implying that duty must be alleged. *City of Buffalo v. Holloway*, 7 *N.Y.* 493; *Taylor v. Atlantic Mutual Ins. Co.*, 2 *Bosw.* 106; *Congreve v. Morgan*, 4 *Duer*, 439; *Seymour v. Maddox*, 16 *Q.B.* 326; S.C. 71 *Eng. Com. L. R.* 326; and see *McGinity v. Mayor, etc.*, 5 *Duer*, 674; and *Gregory v. Oaksmith*, 12 *How. Pr.* 134.

125. The allegation that the injury continued to be done from time to time, from the date of the wrongful act until the commencement of the suit, claiming special damages as a matter of aggravation, need not state the time or times when the damages were sustained, as the legal effect of the allegation is that they were sustained when the wrongful act was committed, and on divers days between that time and the commencement of the suit. *McConnel v. Kibbe*, 33 *Ill.* 175.

JUDGMENTS, HOW PLEADED.

126. In pleading a judgment, and especially of a court of general jurisdiction, it is not necessary to state

the facts conferring jurisdiction, but such judgment may be stated to have been duly given or made, and if controverted, the facts conferring jurisdiction must be established on the trial. *Cal. Pr. Act*, § 59; *N.Y. Code*, § 161; *Nevada Code*, § 59; *Idaho* § 59; *Arizona*, § 59; *Oregon*, § 85; *Low v. Burrows*, 12 *Cal.* 181; *Hanscom v. Tower*, 17 *Cal.* 518; *Hunt v. Dutcher*, 13 *How. Pr.* 538.

127. But in pleading the judgment of a court of limited jurisdiction, it is necessary to set forth the facts which give jurisdiction (*Smith v. Andrews*, 6 *Cal.* 652), as the law presumes nothing in favor of their jurisdiction. *Swain v. Chase*, 12 *Cal.* 283; *Rowley v. Howard*, 23 *Cal.* 403; *McDonald v. Katz*, 31 *Cal.* 169.

128. The decisions in New York seem to bear the other way on this point, and would appear to conform more nearly to the language of the statute than the California decisions. There, it seems, it is no longer necessary to state the facts conferring jurisdiction on a court or officer of limited jurisdiction. (*Wheeler v. Dakin*, 12 *How. Pr.* 542.) If it be denied, jurisdiction and all jurisdictional facts must be proved. (*Id.*) So held in pleading an insolvent discharge. *Livingston v. Oaksmith*, 13 *Abb. Pr.* 183; *Carter v. Koezley*, 14 *Id.* 147; *per contra*, *McDonald v. Katz*, 31 *Cal.* 169.

129. In pleading a judgment, the precise words of the record need not be observed, and surplusage or immaterial omissions in matters of substance, in such pleas, are attended with no other consequences than in other cases. But in matters of description, the record produced must conform strictly to the plea. *Whittaker*

v. Bramson, 2 *Paine*, 209; compare *Riddle v. Potter*, 1 *Cranch C. Ct.* 288.

130. But this section does not refer to foreign judgments, and a general averment of jurisdiction of a foreign tribunal is not sufficient; (*Hollister v. Hollister*, 10 *How. Pr.* 539; citing *Barnes v. Harris*, 3 *Barb.* 603; *Ayres v. Covill*, 18 *Id.* 260; *Bement v. Wisner*, 1 *N.Y. Code R. (N.S.)* 143;) and therefore facts showing jurisdiction both of person and subject matter must be stated. *McLaughlin v. Nichols*, 13 *Abb. Pr.* 244.

131. But in California, where the transcript of the judgment shows the jurisdiction of the court on its face, it is not necessary to aver jurisdiction. (*Low v. Burrows*, 12 *Cal.* 181.) In declaring on a *justice's court judgment* of a *sister state*, the statute giving jurisdiction to the justice must be pleaded. *Sheldon v. Hopkins*, 7 *Wend.* 435; *Thomas v. Robinson*, 3 *Wend.* 268.

STATUTES, HOW PLEADED.

132. *Pleading a statute* is merely stating the facts which bring a case within it, without making mention, or taking any notice of the statute itself. *Counting upon a statute* consists in making *express reference* to it, as by the words, "against the form of the statute," or, "by force of the statute in such case made and provided." *Reciting a statute* is quoting or stating its contents, and either form may be adopted by the pleader. *Gould's Pl.* 46, note.

133. In pleading a private statute, or right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, for the Court to

take judicial notice thereof. (*Cal. Pr. Act*, § 61; *N.Y. Code*, § 163; *Idaho*, § 61; *Nevada*, § 61; *Arizona*, § 61; *Oregon*, § 87; 1 *Van Santv.* 270; 5 *Sand.* 153.) An averment that the statute *was passed* is sufficient. *Wolf v. Superv. of Richmond*, 11 *Abb. Pr.* 270.

134. In pleading an act of the Legislature, the title, being no part of an act, need not be recited. (*Eckert v. Head*, 1 *Mo.* 593.) But where a party refers to an act merely by the title, he thereby makes the title material, and must recite it correctly. (*Id.*) But when a pleader wishes to avail himself of a statutory privilege or right given by particular facts, he must show the facts; and those facts which the statute requires as the foundation of the action must be stated in the complaint. *Dye v. Dye*, 11 *Cal.* 163; *Williams v. Hingham and Quincy Bridge*, 4 *Pick.* 341; *Manning v. Merritt, Clarke*, 98; *Russell v. Mayor of N.Y.*, 1 *Daly*, 263; *Walker v. Johnson*, 2 *McLean*, 92; *Goelet v. Cowdery*, 1 *Duer.* 132; *Yertore v. Wiswell*, 16 *How. Pr.* 8; *Brown v. Harmon*, 21 *Barb.* 508; *Drown v. Stimpson*, 2 *Mass.* 444; *Soper v. Harvard College*, 1 *Pick.* 178.

135. It is safest to adopt and follow the very words of the law (*Ford v. Babcock*, 2 *Sand.* 523; *Thomas v. People*, 19 *Wend.* 480; *Cole v. Jessup*, 10 *How. Pr.* 515; overruling *Fowler v. Hunt*, 10 *Johns.* 464), as the Court takes judicial notice of the law, though the statute may be referred to in some cases, to avoid ambiguity and create a certainty as to the relief demanded, as where the plaintiff has his election to sue for a penalty given by a statute, or to bring his action simply for the debt. *City of Utica v. Richardson*, 6 *Hill.* 300.

136. With reference to acts regulated by the provisions of a statute, as of the Statute of Frauds, it is sufficient to use such certainty of allegations as was sufficient before the statute. So, on a promise to answer for the debt or default of another, it is not necessary in the complaint to aver that the promise was in writing. (*Wakefield v. Greenhood*, 29 *Cal.* 597; *Stern v. Drinker*, 2 *E. D. Smith*, 406; *Hilliard v. Austin*, 17 *Barb.* 141; *Etling v. Vanderlyn*, 4 *Johns.* 237.) Or, in an action on a contract relating to real estate. *Livingston v. Smith*, 14 *How. Pr.* 492; *Reynolds v. Dunkirk R. R. Co.*, 17 *Barb.* 617; *Champlin v. Parish*, 11 *Paige*, 408.

137. If a statute should contain exceptions in the enacting clause, the plaintiff must clearly show that the defendant is not within the exception. (1 *T. R.* 144; 6 *Id.* 559; 1 *East.* 646; 2 *Chitt. R.* 522; *Bennett v. Hurd*, 3 *Johns.* 438; *Teel v. Fonda*, 4 *Id.* 304; *Hart v. Cleis*, 8 *Id.* 41; *Sheldon v. Clark*, 1 *Id.* 513; *Burr v. Van Buskirk*, 3 *Cow.* 263; *Foster v. Hazen*, 12 *Barb.* 547; *First Baptist Church v. Utica and Schenectady R.R. Co.*, 6 *Id.* 313.) Unless it be matter of defense, in which case the burden of proof being on the defendant, the plaintiff need not allege it in the complaint, as the plaintiff need not allege anything in anticipation. *Canfield v. Tobias*, 21 *Cal.* 349; *Radcliffe v. Rowley*, 2 *Barb. Ch.* 23.

138. Numerous violations of the same subdivision of a section of a statute may be alleged in one count; (*Longworthy v. Knapp*, 4 *Abb. Pr.* 115; *People v. McFadden*, 13 *Wend.* 396; *Gaffney v. Colvil*, 6 *Hill.* 567;) but separate counts must be used for violations of separate subdivisions. *Id.*

139. In penal actions founded on statutes, facts constituting the offense must be set out, and it must be stated as a substantive allegation that the offense was committed against the form of the statute. (2 *Allen*, 321; *Peabody v. Hayt*, 10 *Mass.* 36; *Nichols v. Squire*, 5 *Pick.* 168; *Haskell v. Moody*, 9 *Id.* 162; *Reed v. Northfield*, 13 *Id.* 99.) As a general rule, a *scienter* need not be averred. *Bayard v. Smith*, 17 *Wend.* 88; *Gaffney v. Colvil*, 6 *Hill.* 567.

140. In remedial actions founded on statutes, such averments must be made as are necessary to bring the case within the statute; (*Reed v. Northfield*, 13 *Pick.* 94; *Worster v. Canal Bridge*, 16 *Id.* 541; *Read v. Chelmsford*, 16 *Id.* 128; *Mitchell v. Clapp*, 12 *Cush.* 278;) as remedies in derogation of the common law must be strictly pursued. *Steel v. Steel*, 1 *Nev.* 27.

FOREIGN STATUTES.

141. Where plaintiff relies on the statute laws of another state, he must aver those laws in his pleadings in the same manner as other facts. *Throop v. Hatch*, 3 *Abb. Pr.* 25; *Phinney v. Phinney*, 17 *How. Pr.* 197; *Thatcher v. Morris*, 11 *N.Y.* 437; *Monroe v. Douglass*, 1 *Seld.* 447; *Hutchinson v. Patrick*, 3 *Mo.* 65; *Ruse v. Mutual Benefit Ins. Co.*, 23 *N.Y.* 516; *Bean v. Briggs*, 4 *Iowa*, 464; *Walker v. Maxwell*, 1 *Mass.* 104; and see *Andrews v. Herriot*, 4 *Cow.* 510, *note*.

142. Thus, to plead that a contract is void by foreign usury laws, the laws should be stated; and the facts which render the contract void according to them should be alleged. (*Curtis v. Masten*, 11 *Paige*, 15.) And

the same rule applies to municipal laws and ordinances. (*Harker v. Mayor of N.Y.*, 17 *Wend.* 199; *People v. Mayor of N.Y.*, 7 *How. Pr.* 81.) To show due diligence in suing on a foreign debt, the laws of such state regulating the contract must be averred. *Mendenhall v. Gately*, 18 *Ind.* 149.

143. Pleading foreign statutes by their titles and dates, or statement of their general provisions and requirements, is insufficient. (*Throop v. Hatch*, 3 *Abb.Pr.* 23; *Phinney v. Phinney*, 17 *How. Pr.* 197; *Carey v. Cincinnati*, etc., R.R. Co., 5 *Clarke (Iowa)*, 357.) But in the courts of the United States, no averment need be made in pleading, in respect to the laws of the several states, which would not be necessary within the respective states. *Pennington v. Gibson*, 16 *How. U. S.* 65.

STATUTE OF LIMITATIONS.

144. Facts taking the case out of the Statute of Limitations must be specially set out in the complaint. (*Wormouth v. Hatch*, 33 *Cal.* 121.) A failure to plead it is a waiver of the same. (*People v. Broadway Wharf Co.*, 31 *Cal.* 33.) For if it appear on the face of the complaint that the claim is barred, and no facts are alleged taking the demand from the operation of the statute, the complaint is defective, and demurrer lies. (*Smith v. Richmond*, 19 *Cal.* 476.) So, if fraud be alleged as committed more than three years before the commencement of the action, that period being the limitation prescribed by our statute, he must allege discovery at a period bringing him within the exception. It is not, however, in general, necessary for plaintiff to allege in his complaint any facts or circum-

stances to avoid or anticipate the defense of the Statute of Limitations, unless the cause of action appear, upon the face of the complaint, to be barred.

145. Where triple damages are given by a statute, it must be expressly inserted in the complaint, which must either recite the statute or conclude to the damage of the plaintiff against the form of the statute. As in actions for waste. (*Chipman v. Emeric*, 5 *Cal.* 239; see, also, *Rees v. Emeric*, 6 *S. and R.* 288; *Newcomb v. Butterfield*, 8 *Johns.* 342; *Livingston v. Platner*, 1 *Cow.* 175; *Benton v. Dalea*, *Id.* 160.) Where there are separate statutes, giving a different measure of damages for the same wrongs, it has been held that the plaintiff must elect upon which he will rely. *Sipperly v. Troy and Boston R.R. Co.*, 9 *How. Pr.* 83.

THIRD SUBDIVISION—DEMAND FOR RELIEF.

146. The third subdivision of § 39 of the California Practice Act prescribes that the complaint shall contain a demand for the relief which the plaintiff claims. This is the most important subdivision of the section, as the relief granted to the plaintiff, if there be no answer, shall not exceed that demanded in the complaint. (*Cal. Pr. Act*, § 147; *N.Y. Code*, § 275; and *Codes of Nevada, Idaho, Arizona*, etc.; *Janson v. Smith*, *Cal. Sup. Ct., Jan. T.*, 1866; *Raun v. Reynolds*, 11 *Cal.* 19; *Gage v. Rogers*, 20 *Cal.* 91; *Lattimer v. Ryan*, *Id.* 628; *Lamping v. Hyatt*, 27 *Cal.* 102; *Gautier v. English*, 29 *Id.* 165; *Parrott v. Den*, 34 *Cal.* 79; *Simonson v. Blake*, 12 *Abb. Pr.* 331; 20 *How. Pr.* 484; *Hurd v. Leavenworth*, 1 *Code R. (N.S.)* 278; *Walton v. Walton*, 32 *Barb.* 203; 20 *How. Pr.* 347; *Anon.*, 11 *Abb. Pr.* 231; and

Bond *v.* Pacheco, 30 *Cal.* 531;) where it is held that a judgment rendered for a sum greater than that demanded in the prayer, is not void, but erroneous.

147. But in any other case than a default of the defendant, as where issue is joined, the Court may grant any relief consistent with the case made by the complaint and embraced within the issue. (*Cal. Pr. Act*, § 147; *Savings and Loan Society v. Thompson*, *Cal. Sup. Ct.*, *Oct. T.*, 1867.) So that where there is an answer to the complaint, the prayer for relief becomes immaterial. *Id.*; *Marquat v. Marquat*, 2 *Kern.* 336; so held in *mandamus* and *quo warranto*; *People v. Board of Supervisors*, 27 *Cal.* 655.

148. The effect of the prayer of the complaint is discussed and qualified in *Savings and Loan Society v. Thompson*, 32 *Cal.* 347; 34 *Cal.* 77; *Lane v. Gluckauf*, 28 *Cal.* 289; *Cassacia v. Phoenix Ins. Co.*, 28 *Id.* 628; *McComb v. Reed*, 28 *Cal.* 289; *Van Dyke v. Jackson*, 1 *E. D. Smith*, 419; *Jones v. Butler*, 30 *Barb.* 641; 20 *How. Pr.* 189; *Emery v. Pease*, 20 *N.Y.* 62; *Marquat v. Marquat*, 12 *Id.* 336; reversing *S.C.*, 7 *How. Pr.* 417.

149. The theory of the Code seems to require the plaintiff specifically to demand the relief to which he supposes himself entitled. *L'Amoureux v. Atlantic Mut. Ins. Co.*, 3 *Duer.* 680; *Mills v. Thursby*, 2 *Abb. Pr.* 432.

150. Where a party asks for a specific relief, or for such other or further order as may be just, the Court may afford any relief compatible with the facts of the

case presented. (*People v. Turner*, 1 *Cal.* 152.) And if specific relief cannot be granted, such relief as the case authorizes may be had under the prayer for general relief. (*People v. Turner*, 1 *Cal.* 152; *Truebody v. Jacobson*, 2 *Cal.* 269; *Rollins v. Forbes*, 10 *Cal.* 299; *Hemson v. Decker*, 29 *How. Pr.* 385; see 24 *N.Y.* 62.) Thus, under the general prayer, the Court may allow a deed to be reformed by inserting in it a power of revocation. (*Grafton v. Remsen*, 16 *How. Pr.* 32.) It is, however, improper to include counsel fees and amount paid for taxes, in the judgment, if not asked for in the prayer for relief. *Janson v. Smith*, *Cal. Sup. Ct., Jan. T.*, 1866.

151. To entitle plaintiff to relief in equity, it must be shown that he is without remedy at law. (*Lupton v. Lupton*, 3 *Cal.* 120; *Parker v. Woolen Co.*, 2 *Black. U.S.* 545.) What averments on the face of a bill in equity entitle plaintiff to relief, see *Griffing v. Gibb*, 2 *Black. U.S.* 519.

152. The prayer of a complaint may seek both legal and equitable relief where the matter arises out of the same transaction. (*Gates v. Kieff*, 7 *Cal.* 125; *Marius v. Bicknell*, 10 *Cal.* 224; *Weaver v. Conger*, *Id.* 237; *Rollins v. Forbes*, *Id.* 300; *Hill v. Taylor*, 22 *Id.* 191; *Eastman v. Turman*, 24 *Id.* 382; *Gray v. Dougherty*, 25 *Id.* 266; *Moses v. Walker*, 2 *Hilt.* 536; *Phalen v. Bushnell*, 46 *Barb.* 24; see *Ante*, Note 25.) But they must be separately stated in the complaint. (*Gates v. Kieff*, 7 *Cal.* 124; *Getty v. Huds. Riv. R.R. Co.*, 6 *How. Pr.* 269; *N.Y. Ice Co. v. N.W. Ins. Co.*, 23 *N.Y.* 357; 21 *How. Pr.* 296; 12 *Abb. Pr.* 414; *Young v. Edwards*, 11 *How. Pr.* 201; See *Linden v. Hepburn*, 2 *Sandf.*

668; 5 *How. Pr.* 188; 3 *C. R.* 65; *Lamport v. Abbott*, 12 *How. Pr.* 340.) And the grounds of equitable interposition should be stated subsequently to, and distinct from, those upon which the judgment at law is sought: *Natoma Water and Mining Co. v. Clarkin*, 14 *Cal.* 544.

153. A prayer for an injunction is proper in an action of trespass. (*Gates v. Kieff*, 7 *Cal.* 125.) Or where suit is brought to test the priority of the appropriation of water. (*Marius v. Bicknell*, 10 *Cal.* 217.) Or on foreclosure of a mortgage to restrain waste during the period for redemption. *Hill v. Taylor*, 22 *Cal.* 191.

154. But a prayer cannot include a demand for two kinds of relief inconsistent with each other, as for redelivery of and damages for detention of personal property. (*Maxwell v. Farnam*, 7 *How. Pr.* 236; *Linden v. Hepburn*, 3 *Sandf.* 668; 9 *N.Y. Leg. Obs.* 80.) Or for general relief and for judgment in a specified sum on contract. (*Durant v. Gardner*, 10 *Abb. Pr.* 445; 19 *How. Pr.* 94; *Hemson v. Decker*, 29 *How. Pr.* 385.) And the Court will not resort to rules of construction to determine the species of relief demanded. (*Gates v. Kieff*, 7 *Cal.* 125.) But, although the prayer be inartificially framed, the Court will grant relief. *People v. Turner*, 1 *Cal.* 152; *Truebody v. Jacobson*, 2 *Cal.* 269; *Stewart v. Hutchinson*, 29 *How. Pr.* 181.

155. Under the liberal rules of our Code, the complaint must be taken as a whole, and mere failure to make the *prayer* conform to the causes of action set forth in the complaint, will not preclude the plaintiff

from obtaining the relief which the complaint seeks, but which the prayer omits. A party cannot state one set of facts in his *complaint*, pray for the relief which those facts would authorize, and get judgment upon *another* set of facts.

156. In general, a demand for judgment in the alternative is improper. (Maxwell *v.* Farnam, 7 *How. Pr.* 236; Durant *v.* Gardner, 10 *Abb. Pr.* 445; 19 *How. Pr.* 94.) But in actions for equitable relief, the complaint may be framed with a double aspect where there is doubt as to the particular relief to which the plaintiff is entitled. Young *v.* Edwards, 11 *How. Pr.* 201; Warwick *v.* Mayor of N.Y., 28 *Barb.* 210; 7 *Abb. Pr.* 265; People *v.* Mayor of N.Y., 28 *Barb.* 240; 8 *Abb. Pr.* 7; Wood *v.* Seeley, 32 *N.Y.* 105.

FORMS OF COMPLAINTS.

SUBDIVISION FIRST.

By and against Particular Persons, Individually, and in Representative Character and Official Capacity.

CHAPTER I.

ASSIGNEES AND DEVISEES.

No. 36.

i. By the Assignee of a Claim.

[TITLE.]

The plaintiff complains, and alleges:

I. [*State cause of action accruing to the plaintiff's assignor.*]

II. That on the day of, 187., at, the said assigned the said claim to plaintiff.

[*Demand of Judgment.*]

1. Assignment.—Any act amounting to a rightful appropriation of a debt constitutes an assignment. In fact, any act whereby one per-

son's interest in a debt passes, is an assignment. (*Wiggins v. McDonald*, 18 *Cal.* 126.) So, when an order is given for a valuable consideration, and for the whole amount of a demand against drawee, though worthless as a bill, it operates as an assignment of the debt or fund against which it is drawn. (*Wheatley v. Strobe*, 12 *Cal.* 92.) An order drawn by a creditor on his debtor is an assignment of the debt *pro tanto*. (*McEwen v. Johnson*, 7 *Cal.* 258.) The indorsement of a bill of lading, *prima facie*, vests the property in the goods in the indorsee. (*Lineker v. Ayresford*, 1 *Cal.* 75; *Harris v. De Wolf*, 4 *Pet.* 147; *Balderston v. Manro*, 2 *Cranch. C. Ct.* 63.) Assignment of instrument under seal may be made by writing, without a seal. (*Moore v. Waddle*, 34 *Cal.* 145.) The mere signing an assignment without delivery is insufficient. *Ritter v. Stevenson*, 7 *Cal.* 388.

2. Assignment, how Alleged.—Where the plaintiff is an assignee, the complaint should allege the fact of the assignment. (*Prindle v. Caruthers*, 15 *N.Y.* 426; *White v. Brown*, 14 *How. Pr.* 282; *Adams v. Holley*, 12 *How. Pr.* 330.) But it need not state any consideration for the assignment. (*Vogel v. Badcock*, 1 *Abb. Pr.* 177; *Horner v. Wood*, 15 *Barb.* 372; *Martin v. Kanouse*, 3 *Abb. Pr.* 331; *Gregory v. Freeman*, 2 *Zab.* 405; *Artcher v. Zeh*, 5 *Hill.* 200.) Where an instrument not assignable is assigned and sued on by the assignee, if the assignor is made a party, it is immaterial, and need not be alleged how the assignment was made. (*Buntin v. Weddle*, 20 *Ind.* 449.) Where a party sets up in his pleadings an assignment to him of a contract made with another, he must allege a positive transfer and the character of it. *Stearns v. Martin*, 4 *Cal.* 227.

3. Assignment, Sufficient Averment of.—It is not enough merely to allege that "the said plaintiff is now the sole owner of the demand." (*Thomas v. Desmond*, 12 *How. Pr.* 321; *Russell v. Clapp*, 7 *Barb.* 482; *Bentley v. Jones*, 4 *How. Pr.* 202; *McMurray v. Gifford*, 5 *Id.* 14; *Parker v. Totten*, 10 *Id.* 233.) That A. duly assigned and transferred all his interest in the contract to the plaintiff B., and the plaintiff C. became interested by a sale and assignment to him of a part of B.'s interest, was held sufficient. *Horner v. Wood*, 15 *Barb.* 372; *Fowler v. N. Y. Indem. Ins. Co.*, 23 *Barb.* 151; *Morange v. Mudge*, 6 *Abb. Pr.* 243.

4. Account.—The assignee may sue in his own name on an account assigned to him. (*Carpenter v. Johnson*, 1 *Nev.* 331.) But where there is no final settlement of partnership accounts, and no bal-

ance struck, and no express promise on the part of the individual members to pay their ascertained portion of this amount, no action can be maintained therefor in *assumpsit*, nor can the claim be assigned so that the assignee may sue. (*Bullard v. Kinney*, 10 *Cal.* 63.) The assignee of an account and note given in part payment of it, where the assignment of the two claims were contemporaneous, may sue in his own name. (*Armstrong, v. Cushney*, 43 *Barb.* 340.) An assignment of an account by endorsement of the word "assigned" is sufficient. (*Ryan v. Maddux*, 6 *Cal.* 247.) And it may be amended on trial by writing above it. "For value received, I hereby assign the within account." (*Id.*) Where there is no final settlement of partnership accounts, and no balance struck, and no express promise on the part of the individual members to pay their portion of the amount, the claim cannot be assigned so that assignee may sue. *Bullard v. Kinney*, 10 *Cal.* 63.

5. Bonds, Notes, etc.—An assignee of bonds, notes, etc., may maintain action in his own name. (*Mandeville v. Riddle*, 1 *Cranch.* 290; *Dunlap v. Harris*, 3 *Cranch.* 311.) The assignment of a note to the maker is payment of the same. So of a joint and several note, assigned to one of the makers. (*Gordon v. Wansey*, 21 *Cal.* 77.) The payment by the maker of a non-negotiable note, of the sum due upon an attachment against the payee, without notice of assignment, will bar a suit by the assignee. *Weinwick v. Bender*, 33 *Mo.* 80.

6. Consideration.—A promissory note imports a consideration, and none need be pleaded. (*Winters v. Rush*, 34 *Cal.* 136.) No consideration need be averred in the complaint. (*Martin v. Kanouse*, 2 *Abb. Pr.* 331; *Horner v. Wood*, 15 *Barb.* 372.) Even for a sealed contract, an averment to that effect imports that the assignment was by a sealed instrument, from which a consideration is to be inferred. (*Moore v. Waddle*, 34 *Cal.* 145; *Fowler v. New York Indem. Ins. Co.*, 23 *Barb.* 143.) And consideration need not be stated. (*Clark v. Downing*, 1 *E. D. Smith*, 406; *Burnett v. Gwynne*, 2 *Abb. Pr.* 79; *Vogel v. Badcock*, 1 *Id.* 176; *Martin v. Kanouse*, 2 *Id.* 330.) So, in Kentucky, it is not necessary in a suit by an assignee of a chose in action, against the assignor, to aver a valuable consideration. It is sufficient to set out the assignment. *Holt v. Thompson*, 1 *Duwall*, 301.

7. Corporation.—In an action brought by the assignee of a corporation, it is not essential to particularly state the fact of incorporation. A statement of the name of the corporation, and of the making

of the agreement between them, and of what the corporation did in fulfillment of the agreement, is sufficient. (*Kennedy v. Cotton*, 28 *Barb.* 59.) And the complaint need not aver that the directors were authorized to make it. *Nelson v. Eaton*, 16 *Abb. Pr.* 113.

8. Corporation Stock.—An assignment of shares of stock in a corporation formed under the Act of 1853, by delivery of certificates, without transfer on the books, is invalid against subsequent purchaser on execution against assignor without notice. (*Naglee v. Pacific Wharf Co.*, 20 *Cal.* 529; see also, *Strout v. Nat. Wat. and Min. Co.*, 9 *Cal.* 78.) But where shares of stock are assigned by mere delivery, notice of such assignment must be given to subsequent purchaser. *Naglee v. Pacific Wharf Co.*, 20 *Cal.* 529.

9. Debt.—The assignee of an order drawn on defendants for an amount due, may recover the same. (*McEwen v. Johnson*, 7 *Cal.* 260; *Wheatley v. Strobe*, 12 *Id.* 97; *Pope v. Huth*, 14 *Id.* 408.) And drawees with notice are liable to payees without an express promise to pay. In Maine, an assignment of a debt may be made by parol, or may be inferred from the acts of the parties. (*Garnsey v. Gardner*, 49 *Maine*, 167.) It seems that in New Hampshire, claims for property and for torts done to property may be assigned by parol. (*Jordan v. Gillen*, 44 *N.H.* 424.) So, in Missouri, a general conveyance of all "debts that may be due," without a schedule, passes to the grantee such a title as will enable him to recover from a subsequent general assignee. *Page v. Gardner*, 20 *Mo.* 507.

10. Effect of Assignments.—An absolute assignment of a demand enables assignee to sue for and recover the whole, even though but a part was assigned. (*Gradwohl v. Harris*, 29 *Cal.* 150.) For equity upholds assignments of choses in action, contingent expectations, and things which have no present actual existence but rest in possibility; provided they are fairly made, and not against public policy. *Pierce v. Robinson*, 13 *Cal.* 116; *Bibend v. L. and L. F. and L. Ins. Co.*, 30 *Cal.* 87.

11. Goods Sold.—Where the vendor of goods is not at the time in possession, the transfer is an assignment, and an actual and continued change of possession is required equally as in cases of sale by one in possession. (*Weil v. Paul*, 22 *Cal.* 492.) Where B. assigned to C. a contract for the delivery of goods to arrive, and C. after the arrival of the goods tendered payment for the same, A., the vendor, was not entitled to notice of the assignment, but that C. may enforce the contract against A. *Morgan v. Lowe*, 5 *Cal.* 325.

12. Insurance.—An assignment of a policy of insurance on a stock of goods attaches in equity as a lien upon the amount due on the policy to the extent of the debt as soon as the loss occurs. *Bibend v. L. and L. F. and L. Ins. Co.*, 30 *Cal.* 78; see, also, *Pope v. Huth*, 14 *Cal.* 403; *Wheatley v. Strobe*, 12 *Cal.* 92.

13. Judgment.—If a judgment creditor assign the judgment, and the judgment debtor without notice of the assignment afterwards pays the same voluntarily to the sheriff, by reason of service of garnishic process upon him, the assignee may still enforce the judgment. (*Brown v. Ayres*, 33 *Cal.* 525.) The assignment of a judgment void because the amount is beyond jurisdiction of the court, carries with it the assignment of the debt. (*Brown v. Scott*, 25 *Cal.* 194.) So of a judgment upon an unassignable cause of action for a tort. (*Lawrence v. Martin*, 22 *Cal.* 173.) In suit to enforce a judgment lien on real estate brought by assignees of the judgment, the judgment and the assignment must be set forth. *Brookshire v. Lomax*, 20 *Ind.* 512.

14. Lease.—An assignment of all right, title, and interest of the lessee, conveys his right for compensation for new erections on the land under the covenants. *Hunt v. Danforth*, 2 *Curt. C. Ct.* 592.

15. Mortgage.—A mortgage, independent of the debt it is intended to secure, has no assignable quality. (*Polhemas v. Trainer*, 30 *Cal.* 685.) The assignment of a debt secured by mortgage, in equity, if not in law, carries the mortgaged property with it. (*Hatch v. White*, 2 *Gall.* 152.) So, the equitable lien which a vendor of real estate retains upon the property for the unpaid purchase money is not assignable. (*Baum v. Grigsby*, 21 *Cal.* 172; *Lewis v. Covillaud*, 21 *Id.* 178; *Williams v. Younger*, *Id.* 227.) But a claim for damages for trespass on land is assignable, and assignee may maintain an action for the same. *More v. Massini*, 32 *Cal.* 590.

16. Parties.—Under our California system, an action may be brought in the name of the assignee, as the party beneficially interested. (*Wheatley v. Strobe*, 12 *Cal.* 98.) Where a suit is brought by an equitable assignee, the assignor should be made a party. (*Nelson v. Johnson*, 18 *Ind.* 329.) Where an assignee brings an action in the name of his assignor, the defendant cannot avail himself of the plaintiff's want of interest. (*La Baume v. Sweeney*, 17 *Mo.* 153.) At common law, an assignment of chattels is valid without actual delivery. But as against creditors, the title is not perfect without delivery of possession.

(*Meeker v. Wilson*, 1 *Gall.* 419.) It has been held in an action against assignees who are not partners, to recover possession of specific personal property, that the demand must be made upon each person having an interest in order to maintain a joint action. *Jessop v. Miller*, 1 *Keyes*, 321.

17. Rights of Assignee.—The assignee takes the interest by assignment subject to all equities and offsets which existed against the assignor at the time of the assignment. (*Cal. Pr. Act*, § 5; see *McCabe v. Gray*, 20 *Cal.* 509; *Northam v. Gordon*, 23 *Cal.* 255; *Truebody v. Jacobson*, 2 *Cal.* 269; *Olds v. Cummings*, 31 *Ill.* 188; *Fortier v. Darst*, 31 *Ill.* 212; *United States v. Sturges*, 1 *Paine*, 525; *Shaw v. Shaw*, 4 *Cranch C. Ct.* 715; compare *Thomas v. Page*, 3 *McLean*, 369; *Lewis v. Baird*, *Id.* 56; *Shirras v. Craig*, 7 *Cranch*, 34; *Russell v. Clark*, *Id.* 69; *Kinsman v. Parkhurst*, 18 *How. U.S.* 289; *Fales v. Mayberry*, 2 *Gall.* 560; *Tatham v. Loring*, 5 *N.Y. Leg. Obs.* 208; *Timms v. Shannon*, 19 *Md.* 296.) So of bonds assigned under the statutes of Virginia and Indiana. (*Scott v. Shreeve*, 12 *Wheat.* 605; *Bell v. Nimms*, 5 *McLean*, 110.) So of mortgages. A mortgagor may claim the same rights against the assignee of the mortgage as against the mortgagee. (*Hubbard v. Turner*, 2 *McLean*, 519.) So of judgments and decrees. (*United States v. Sampergac*, *Hempst.* 118; affirmed *Id.* 149; *S.C.* 7 *Pet.* 222.) So of negotiable paper after it has lost its negotiable character. (*Gwathmey v. McLane*, 3 *McLean*, 371; *Dundas v. Bowler*, *Id.* 397; *Slacom v. Wishart*, *Id.* 517; *Rounsavel v. Scholfield*, 2 *Cranch C. Ct.* 139.) So, the assignee of a partner takes his interest subject to all equities. (*Nichol v. Mumford*, 4 *Johns. Ch.* 522; *Rodriguez v. Hefferman*, 5 *Id.* 417; *Buchan v. Sumner*, 2 *Barb. Ch.* 165.) As to what may be assigned, and that assignee takes subject to all equities, see *Parties*, Chap. iv., p. 57.

18. Time of Assignment.—One who sues as assignee cannot maintain his title by proof of an assignment made after suit brought. (*Garrigue v. Loescher*, 3 *Bosw.* 578.) A neglect to record an assignment within the statutory period fixed therefor, in cases where an assignment must be recorded, does not make it fraudulent. *Denzer v. Mundy*, 5 *Rob.* 636.

No. 37.

ii. *The Same, where Plaintiff is Trustee.*

[TITLE.]

The plaintiff complains as assignee for the benefit of [state whom], and alleges:

I. [*State a cause of action accrued to the assignor.*]

II. That on the . . . day of . . . , 187., the said C. D. assigned all his property, including the said claim, to the plaintiff, in trust, for the purpose of [*state the purpose.*]

[Demand of Judgment.]

19. Averment of Agency.—A person suing as trustee should make a positive and issuable averment of his trust or agency. *Freeman v. Fulton Fire Ins. Co.*, 14 *Abb. Pr.* 407.

20. Express Trusts.—A *cestui que trust* of an express trust has no right of action until the trust is denied or some act is done by the trustee inconsistent with the trust; and until then the Statute of Limitations does not begin to run. (*White v. Sheldon*, 4 *Nev. Rep.* 280.) When a person takes a title in his own name at the request of another, who furnishes the consideration, the former has the right to presume that he is to hold it until a demand is made upon him for it. *White v. Sheldon*, 4 *Nev. Rep.* 280.

21. Mode of Appointment.—One claiming a right as a substituted trustee, under a will, should state all the material facts distinctly, in his bill. If the will provides two modes for the appointment of new trustees, he must state in which mode he was appointed. *Cruger v. Halliday*, 11 *Paige*, 314.

22. Notice of Trust.—Where an assignment is made to one as trustee of a mercantile firm, and he receives from an obligor a deed for land to members of the firm, and the firm sold the land to their success-

ors in business, some of the original firm being a portion of such successors, the purchasers are chargeable with notice of the trust. *Connelly v. Peck*, 6 *Cal.* 348.

23. Trust Deed.—In Nevada, under § 55 of the Statute concerning Conveyances (*Statutes of 1861*), a declaration of trust as to land must be by deed or conveyance, in writing, subscribed by the party declaring the same, or by his lawful agent thereunto authorized by writing. *Sime v. Howard*, 4 *Nev. Rep.* 473.

24. Trust Fund.—Where the share of one of several *cestuis que trust* in a trust fund is ascertained and known, he may maintain suit for a breach of the trust against the trustee, without joining the other *cestuis que trust*. *Pickering v. De Rochemont*, 45 *N.H.* 67.

25. Who may Assign.—An administrator of an estate in New York may assign a judgment obtained there by intestate against one who has since removed to California. *Low v. Burrows*, 12 *Cal.* 181.

No. 38.

iii. *The Same, where Plaintiff is a Devisee.*

[TITLE.]

The plaintiff as devisee of A. B. deceased, complains, and alleges:

I. [*State cause of action accrued to deceased.*]

II. That the said A. B. was seized of the estate hereinbefore mentioned, and that he died on the day of, 187., at, and by his last will devised the same to this plaintiff [*or defendant*].

[*Demand of Judgment.*]

26. Assets, Allegation of—Assets need not be alleged in suit against heirs for debt of ancestor. (*Elting v. Vanderlyn*, 4 *Johns.* 237.) Where the will by construction shows an intention to charge the real

estate with the payment of a legacy, it is not necessary to aver in the bill a deficiency of personal assets. (*Lewis v. Darling*, 16 *How. U. S.* 1.) The above form of allegation is sufficient on demurrer. *Spier v. Robinson*, 9 *How. Pr.* 325.

No. 39.

iv. *By an Assignee for the Benefit of Creditors.*

[TITLE.]

The plaintiff, as assignee for the benefit of the creditors of, complains of the defendant, and alleges:

I. [*State a cause of action accrued to the assignor.*]

II. That on the . . . day of, 187., at, the said assigned all his property, including the said claim, to the plaintiff [in trust for the purpose of paying all his debts].

[*Demand of Judgment.*]

27. Assignee as Trustee.—An assignee for the benefit of creditors is a trustee. He must allege in his complaint that he sues as such, or the Court will not relieve him from payment of costs in case he fails in the action. (*Murray v. Hendrickson*, 6 *Abb. Pr.* 96; 1 *Bosw.* 635.) For any other purpose this allegation is unnecessary, as he is assignee of an express trust, has the entire legal title, and may sue in his own name without referring to his character as assignee. (*Butterfield v. Macomber*, 22 *How. Pr.* 150.) But an assignment by a creditor of a portion of a debt does not make the assignee joint owner of the whole, and he is not a necessary party in a suit for its recovery. *Leese v. Sherwood*, 21 *Cal.* 152.

28. Bankruptcy.—Proceedings in bankruptcy do not affect the previously acquired right of an assignee of a chose in action to sue in the bankrupt's name. (*Hayes v. Pike*, 17 *N. H.* 564.) In Connecticut, the Insolvent Act of 1853 provides that all the property of the debtor shall be vested in the trustee, and that the trustee may sue in his own name on all choses in action. *Hart v. Stone*, 30 *Conn.* 94.

29. Title to Property.—It is irregular to allege that the demand is the property of the assignor, or that the defendant is indebted thereon to the assignor. *Palmer v. Smedley*, 28 *Barb.* 468; S.C., 6 *Abb. Pr.* 205; compare *Myers v. Machado*, *Id.* 198; S.C., 14 *How. Pr.* 149.

30. Who may Assign.—A party being about to fail may assign a bill of goods to arrive not yet paid for, in trust, to devote proceeds to the payment of the vendor of these specific goods. (*Le Cacheux v. Cutter*, 6 *Cal.* 514.) An assignment of property to a creditor to be sold at auction, and the proceeds to be applied, *First*, In payment of the claim of assignee, and, *Second*, In payment *pro tanto* to other creditors, is not in contravention of the statute (*Morganthau v. Harris*, 12 *Cal.* 245), as insolvency is not presumed from the language of an assignment. (*Id.*) One partner of a firm, sole manager, his co-partners being absent at a great distance, may assign the firm property, in trust, for the benefit of creditors, if necessary for their protection. *Forbes v. Scannell*, 13 *Cal.* 242.

CHAPTER II.

ASSOCIATIONS.

No. 40.

i. By an Association of Tenants in Common.

[TITLE.]

The plaintiffs complain, and allege:

I. That the property hereafter mentioned is owned in common by the Lady Washington Homestead Association.

II. [*State cause of action.*]

[*Demand of Judgment.*]

1. Association.—Associations, as such, are not known in California, as under the laws of this State associations for all purposes are incorporated, and have power to sue and be sued under the corporation laws of California. In New York, however, it appears that associations of persons consisting of seven members and upwards, are invested by law with certain rights and privileges, one of which is the capacity to sue.

2. May Maintain Actions.—Tenants in common may maintain action for the diversion of water. (*De Johnson v. Sepulbeda*, 5 *Cal.* 151; *Parke v. Kilham*, 8 *Id.* 79.) Or they may sue jointly to recover possession of their several undivided interest in a mine. *Goller v. Fett*, 30 *Cal.* 481.

3. Right of Possession.—One tenant in common has a right of enjoyment of the common property, and cannot possess in severalty

before partition. (2 *Bouv. Inst.* 314; *Tevis v. Hicks, Cal. Sup. Ct., Jul. T., 1869.*) And each and every one of them has a right to enter upon and occupy the whole of the common lands and every part thereof. (*Tevis v. Hicks, Cal. Sup. Ct., Jul. T., 1869*; citing *Carpentier v. Webster, 27 Cal. 545.*) Several persons owning a tract of mining claims, as tenants in common, acting under a company name, cannot, in the name of the company, take or hold the interest of any one or more by forfeiture. *Wiseman v. McNulty, 25 Cal. 230*; *Dutch Flat Co. v. Mooney, 12 Id. 534.*

4. Services.—A tenant in common of lands, employed as agent by common agreement between himself and co-tenant, to take charge of the land, make sales thereof at certain prices, receiving a commission of five per cent. on sales, may sue his co-tenant for services in respect to the land outside of selling it. *Thompson v. Salmon, 18 Cal. 632.*

5. Share of Profits of Estate.—In an action by a tenant in common against his co-tenant, in the sole possession of the premises, to recover a share of the profits of the estate, a complaint which avers a tenancy in common between the parties; the sole and exclusive possession of the premises by the defendant; the receipt by him of the rents, issues and profits thereof; a demand by the plaintiff of an account of the same, and the payment of his share; the defendant's refusal; and that the rents, issues and profits amount to \$84,000; is insufficient to support the action. (*Pico v. Columbet, 12 Cal. 414.*) The action is a common law action of account; and, viewed in this light, the complaint should aver that the defendant occupied the premises upon an agreement with the plaintiff, as receiver or bailee of his share of the rents and profits. It is essential to a recovery that it be alleged. *Pico v. Columbet, 12 Cal. 414.*

6. When One may Sue.—One tenant in common may sue a party in possession by adverse claim, and recover the premises. (*Collier v. Corbett, 15 Cal. 183*; see *Stark v. Barrett, 15 Cal. 361.*) Or he may sue alone for his moiety of the estate. (*Covillaud v. Tanner, 7 Cal. 38.*) A tenant in common may maintain a bill in equity against his co-tenant who has exclusively occupied a salt well and works, and a coal mine, the common property, for an account of rents and profits. The defendant in such case is liable for "receiving more than comes to his just share or proportion," under *St. 4 Anne, ch. 16, § 27*; *Earley v. Friend, 16 Grat. 21*; see *Parties, Chap. iv., p. 94.*

sue and be sued in the name of the president or treasurer for the time being of such joint-stock company or association." (*Laws of 1849*, 389.) This act does not include corporations. (*N.Y. Marbled Iron Works v. Smith*, 4 *Duer*, 362.) Its provisions were extended in 1851, 838, ch. 455.

9. Authority to Sue.—The averment of official capacity is essential, as it is an issuable fact. *Tiffany v. Williams*, 10 *Abb. Pr.* 204; *Habricht v. Pemberton*, 4 *Sandf.* 657.

10. Banking Associations.—Banking associations may sue in their corporate name or in the name of their president. (*Leonardsville Bk. v. Willard*, 25 *N.Y.* 574.) An averment that the defendant promised "through its officers" to do a certain thing, without alleging their authority, is sufficient. (*Bank of the Metropolis v. Gutschlick*, 14 *Pet.* 19.) To aver that the agreement was made *by the bank* is sufficient. *Id.*

11. Contract, how Alleged.—In a complaint in the name of the president, the act or contract sued on must be pleaded as the act or contract of the corporation, not as that of the "plaintiff" or "defendant." (*Delafield v. Kinney*, 24 *Wend.* 245; *Christopher v. Stockholm*, 5 *Id.* 36; *Thomas v. Dakin*, 22 *Id.* 9; *Worden v. Worthington*, 2 *Barb.* 368; *Merritt v. Seaman*, 6 *N.Y.* 168; *Pentz v. Sackett*, *Hill & D. Supp.* 113; *Ogdensburgh Bank v. Van Rensselaer*, 6 *Hill.* 240; compare *Hunt v. Van Alstyne*, 25 *Wend.* 605.) But even then the action is deemed to be by the bank, not by the president in right of the bank. *Lowerre v. Vail*, 5 *Abb. Pr.* 229; *Root v. Price*, 22 *How. Pr.* 372.

12. Individual Liability Enforced.—An association must be sued as such, before the individual liability can be enforced. *Robbins v. Wells*, 18 *Abb. Pr.* 191.

13. Officer, Action by and against.—If the suit is brought by the president of a banking association, it must state that plaintiff complains *as such*. (*Hunt v. Van Alstyne*, 25 *Wend.* 605; *Ogdensburgh Bank v. Van Rensselaer*, 6 *Hill*, 240; *Merritt v. Seaman*, 6 *N.Y.* 168; *Gould v. Glass*, 19 *Barb.* 179.) Where, however, he merely describes himself as president, if he also alleges that he sues for the bank, the complaint will be sufficient. *Root v. Price*, 22 *How. Pr.* 372; and see *Van Duser v. Howe*, 21 *N.Y.* 531.

14. Parties Defendant.—Where a member of an unincorporated association sues an officer for an accounting or for fraudulent breach of trust, all the members of the association must be made parties. (5 *Paige*, 60 ; *Warth v. Radde*, 18 *Abb. Pr.* 396.) The names of the stockholders need not be inserted. (*Tibbetts v. Blood*, 21 *Barb.* 650.) Nor need it be shown that it was organized for business purposes. *Id.*

15. Sole Proprietor.—The nominal proprietor of an individual bank, in whose name, as proprietor, all the contracts and transactions of the bank are made and conducted, is a “trustee of an express trust,” and may sue in his own name. *Burbank v. Beach*, 15 *Barb.* 326.

CHAPTER III.

CORPORATIONS.

No. 42.

i. *By a Foreign Corporation.*

[STATE AND COUNTY.]

[COURT.]

THE COMPANY, Plaintiff,	}
<i>against</i>	
JOHN DOE, Defendant.	

The plaintiff complains, and alleges:

I. That it was incorporated by [*or under*] an act of the Legislature of the [State of Nevada], passed on the day of, 18..., for the purpose of [*here state the purpose*].

II. [*State the cause of action.*]

[*Demand of Judgment.*]

1. Capacity.—A foreign corporation must allege its corporate character in the complaint. (Waterville Manfg. Co. *v.* Bryan, 14 *Barb.* 182; Connecticut Bank *v.* Smith, 9 *Abb. Pr.* 175; see, *contra*, Holyoke Bank *v.* Haskins, 4 *Sand.* 675.) It *seems* that if the plaintiff sues in a corporate name, but neglects to allege its corporate character, the complaint is demurrable upon the ground that it shows upon its face that the plaintiff has not legal capacity to sue. (Bank of Havana *v.* Wickham, 7 *Abb. Pr.* 134.) But the objection is waived if not taken by

demurrer. (*Id.*) This is not, however, necessary where they are sued on a contract with them in their corporate name. 18 *Ind.* 237; compare 11 *Iowa*, 502.

2. Existence of Foreign Corporations.—Although a corporate body may carry on business beyond the territorial limits of the state which created it, it has no corporate existence beyond those limits. (*Day v. Newark India Rubber Co.*, 1 *Blatchf.* 628; *Bk. of Augusta v. Earle*, 13 *Pet.* 588; *Ohio and Miss. R.R. Co. v. Wheeler*, 1 *Black.* 286.) Its existence is a question of fact for the jury. *Lindauer v. Delaware Ins. Co.*, 13 *Ark.* 461.

3. Foreign and Domestic Corporation.—A corporation owing its corporate existence to the laws of several states must be considered as a domestic corporation in each of such states; (*State v. Northern Central Railway Co.*, 18 *Md.* 193; see, also, to same effect *Sprague v. Hartford, etc., R.R. Co.*, 5 *R.I.* 233;) each charter creating a legal entity to be recognized within its own state. *Ohio and Miss. R.R. Co. v. Wheeler*, 1 *Black.* 286.

4. Forms.—For forms of averment of an incorporation, see *Mut. Benefit Life Ins. Co. v. Davis*, 12 *N.Y.* 569; *N.Y. Floating Derrick Co. v. N.J. Oil Co.*, 3 *Duer*, 648; *Elizabethport Manuf. Co. v. Campbell*, 13 *Abb. Pr.* 86; *Oswego and Syracuse Plank Road Co. v. Rust*, 5 *How. Pr.* 390.

5. Local Laws.—When a foreign corporation comes by its officers within the jurisdiction of another state, to engage in business, it becomes amenable to the laws of the latter state, and cannot escape the consequences of its illegal acts by setting up its existence under a foreign government. *Austin v. N.Y. and Erie R.R. Co.*, 1 *Dutch.* 381; *People v. Cent. R.R. Co. of N.J.*, 48 *Barb.* 478; *Warren Manfg. Co. v. Etna Ins. Co.*, 2 *Paine*, 501; compare *Id.* 574.

6. Location.—Where defendants are alleged to be a corporation doing business within the State, the Court will not presume as a matter of law that it is a foreign corporation. *Acome v. American Mineral Co.*, 11 *How. Pr.* 24.

7. May Maintain Action.—A corporation existing under the laws of another state may maintain an action in the courts of Missouri. (*Bank of Edwardsville v. Simpson*, 1 *Mo.* 184.) One foreign corpora-

tion may sue another in the courts of New York, upon a cause of action arising in it. (*Bank of Commerce v. Rutland and Washington R.R. Co.*, 10 *How. Pr.* 1.) But a complaint against a foreign corporation must either allege that the plaintiffs are residents of that State, or that the cause of action arose, or the subject of action is situated, within the State; and if it does not, it may be dismissed on motion. *House v. Cooper*, 16 *Id.* 292.

8. Money Loaned.—In an action by a foreign insurance company to recover money loaned, it is not necessary to set out in the complaint, in *hæc verba*, that portion of the plaintiff's charter which confers the power to loan money. *Connecticut Ins. Co. v. Cross*, 18 *Wis.* 109.

9. National Banks.—National banks organized and doing business under the Act of Congress, are to be regarded as *foreign* corporations, within the provisions of the Code of Procedure, authorizing actions to be brought and attachments to be issued against corporations. *Bowen v. First National Bank of Medina*, 34 *How. Pr.* 408; *Cooke v. State National Bank of Boston*, 3 *Abb. Pr. (N.S.)* 339.

10. Officer, Suit by.—An officer of a foreign corporation may sue in his own name on behalf of his company, if his complaint states facts showing his authority to sue on their behalf. Merely alleging authority is not enough. *Myers v. Machado*, 6 *Abb. Pr.* 198.

11. Persons.—Foreign corporations are deemed "persons" within the meaning of the statute relating to taxation, unless a different intent is indicated in the statute. *British Comm. Life Ins. Co. v. Commrs. of Taxes*, 31 *N.Y.* 32; see Note 34.

12. Privileges of Foreign Corporations.—A corporation created by the laws of one state, and composed entirely of citizens of that state, is not entitled to all the privileges and immunities of citizens of every other state. (*Bk. of Augusta v. Earle*, 13 *Pet.* 519, 586.) Nor is it entitled to privileges which by the statutes of the latter are confined to corporations created by the law of that state. (*Myers v. Manhattan Bk.*, 20 *Ohio*, 283.) The nature and extent of state jurisdiction, and the duty of comity towards foreign states, explained in *Merick v. Van Santvoord*, 34 *N.Y.* 208.

13. Residence.—In an action in the Supreme Court of the City of New York against a foreign corporation, where the complaint states a

cause of action of which the Court has jurisdiction, it is unnecessary to aver that the plaintiff resides within the City of New York. *Spencer v. Rogers Locomotive Works*, 17 *Abb. Pr.* 110; S.C. 8 *Bosw.* 612.

No. 43.

ii. *By or against a Domestic Corporation.*

[TITLE.]

The plaintiff complains, and alleges :

I. That it is a corporation created by [*or under*] the laws of this State.

[*Or*, That the defendant is a corporation created by [*or under*] the laws of this State.]

II. [*State cause of action, etc.*]

[*Demand of Judgment.*]

14. Agents and Officers.—A corporation is liable for the acts of its agents *in delicto* as well as *in contractu*. (*Id.*) The officers of a corporation are not proper parties defendant to an action against it to recover a mere money demand, except where the statute authorizes suits against them. (*Brahe v. Pythagoras Association*, 4 *Duer*, 658.) At common law, the officers of a corporation are not liable personally on a promissory note of the corporation. *Hall v. Crandall*, 29 *Cal.* 567.

15. Cause of Action Alleged.—An obligation given to a corporation, which is in terms payable to its agents or directors, is properly described, in declaring on it, as given to the corporation, by the name and description of the directors, etc. (*Bayley v. Onondaga County Mutual Ins. Co.*, 6 *Hill*, 476.) A note was executed by the defendant, payable to the "Board of Trustees of the Sonoma Academy, or their successors in office," and specified that "no change in the name, character, or management of the said academy" should affect the liability of the payor. The complaint of the "Cumberland College" stated that the plaintiff was a corporation, and the same institution of learning formerly known as the "Sonoma Academy;" that the academy

was, after its establishment, changed to "Cumberland College," and that the note was the property of the plaintiff. *Held*, that this complaint showed a good cause of action in the plaintiff. *Cumberland College v. Ish*, 22 *Cal.* 641.

16. Contracts.—A contract not under seal, signed by agents of a corporation, and showing upon its face that the agents intended to contract for the corporation, and not for themselves, may be declared upon as its contract. (*Many v. Beekman Iron Co.*, 9 *Paige*, 188.)

17. Corporate Name.—A corporation is recognized in law by its corporate name, and must sue and be sued by its corporate name. (*Curtiss v. Murray*, 26 *Cal.* 633; *Crawford v. Collins*, 30 *How. Pr.* 398.) An action can only be maintained against a company by the name under which it transacts its business. (*King v. Randlett*, 33 *Cal.* 318. Where the plaintiff sues by an appropriate corporate name, it is not necessary to aver expressly in the complaint that the plaintiff is a corporation. 13 *N.Y.* 313; *Phoenix Bank of N.Y. v. Donnell*, 41 *Barb.* 571.

18. Deed, Averment of.—Where a deed is made to a corporation, by a name varying from the true name, they may sue in their true name, and aver that the defendant made the deed to them by the name mentioned in the deed; and an allegation that the defendants acknowledged themselves to be bound unto the plaintiffs by the description of, etc., is equivalent to such an averment. *N.Y. African Society v. Varick*, 13 *Johns.* 38.

19. Directors of a Corporation.—The directors of a corporation are its chosen representatives, and constitute the corporation to all purposes of dealing with others. (*Maynard v. Fireman's Fund Ins. Co.*, 34 *Cal.* 48.) What they do as the representatives of the corporation, the corporation itself is deemed to do; and the manifested motives and intentions of such directors, when a material fact is in issue, are to be imputed to the corporation. *Id.*

20. Incorporation Act.—The title of the act and the date of its passage are sufficient. The substance thereof need not be set forth. (*Cal. Pr. Act*, § 61; *N.Y. Code*, § 163; *U.S. Bank v. Haskins*, 1 *Johns. Cas.* 132.) Where the original act is referred to in the complaint, a vague reference to other general statutes affecting it does not render the

complaint demurrable. (*Sun Mut. Ins. Co. v. Dwight*, 1 *Hill*. 50.) But the title of the act must be set forth with accuracy. (*Union Bank v. Dewey*, 1 *Sandf.* 509.) For form of averment, see *N.Y. Floating Derrick Co. v. N.J. Oil Co.*, 3 *Duer*, 648.

21. Incorporation, Averment of.—A domestic corporation need not aver its incorporation at all. (*La Fayette Ins. Co. v. Rogers*, 30 *Barb.* 492; *Shoe and Leather Bk. v. Brown*, 9 *Abb. Pr.* 219; *Kennedy v. Colton*, 28 *Barb.* 62.) Decisions before the adoption of the Code in New York: (*Henriques v. Dutch West India Co.*, 2 *Ld. Raym.* 1,535; 3 *Harr.* 105; 4 *Blackf.* 267; 5 *Id.* 146; *Morris v. Stops, Hob.* 211; *U.S. Bank v. Haskins*, 1 *Johns. Cas.* 132; see, also, 4 *Sandf.* 675; *Bk. of Utica v. Smalley*, 2 *Cow.* 770; *Bk. of Auburn v. Weed*, 19 *Johns.* 300; *Bk. of Michigan v. Williams*, 5 *Wend.* 478; *Proprietors of Southold v. Horton*, 6 *Hill*, 501; *Bk. of Genesee v. Patchin Bk.*, 13 *N.Y.* 309; *Metropolitan Bk. v. Lord*, 4 *Duer*, 630; *La Fayette Ins. Co. v. Rogers*, 30 *Barb.* 491; *Shoe and Leather Bank v. Brown*, 9 *Abb. Pr.* 218.) This is also the rule in Wisconsin. (*Chickering Lodge v. McDonald*, 16 *Wis.* 112.) It follows, that a complaint *against* a corporation need not allege its incorporation. (*Acome v. American Min. Co.*, 11 *How. Pr.* 24; *Lighte v. Everett Fire Ins. Co.*, 5 *Bosw.* 716.) Such an omission is certainly no ground for demurrer. (*Id.*) But as a question of practice, it is better always to allege incorporation.

22. Incorporation Inferred.—Where, in an action brought against the directors of a corporation, facts are stated in the complaint which show that the defendants became a body corporate, no special averment to that effect is necessary. The fact of incorporation is an inference of law. *Falconer v. Campbell*, 2 *McLean*, 195.

23. Incorporation, Proof of.—Where no such allegation exists, the plaintiff must prove the incorporation by evidence of the charter or general act, organization, and user. *Waterville Manf. Co. v. Bryan*, 14 *Barb.* 182; *Stoddard v. Onondaga Annual Conference*, 12 *Id.* 573.

24. Individual Banker.—In New York, an individual banker commencing and carrying on business under the General Banking Act of that State and the acts amending the same, is a corporation sole; and as such he may assume a corporate name, as well as may an association of several persons. An action by such banker upon a cause of action accruing to him as such, is properly brought in the corporate name. *Bank of Havana v. Wickham*, 7 *Abb. Pr.* 134; *Hallett v. Harrower*, 33 *Barb.* 537.

25. Injunction.—A corporation may be enjoined, and the general and ordinary business suspended. (*Cal. Pr. Act*, § 117; *Ballston Spa Bk. v. Marine Bk.*, 18 *Wis.* 490.) Or it may be proceeded against for the claim of a creditor. *Cal. Pr. Act*, § 244.

26. Joint Action.—Where an obligation is executed to two corporations jointly, they may sue thereon jointly. *Gathwright v. Calloway Co.*, 10 *Mo.* 663.

27. Jurisdictional Facts.—It is not necessary for the complaint to show that the defendants transact their general business, or keep an office within the city. *Corn Exchange Bank v. Western Transportation Co.*, 15 *Abb. Pr.* 319, *note*; *Koenig v. Nott*, 2 *Hill.* 323; *S.C.*, 8 *Abb. Pr.* 384.

28. Legal Capacity.—The allegation that a plaintiff is a corporation, organized and existing under the laws of the State, is sufficient to establish the legal capacity to sue. *Cal. Steam Nav. Co. v. Wright*, 6 *Cal.* 258.

29. Libel and Slander.—A corporation may maintain action for libel on it as such. (*Shoe and Leather Bank v. Thompson*, 18 *Abb. Pr.* 413.) So, also, in California, it is held that a corporation has the power to compose and publish a libel, and by reason thereof, when done, becomes liable to an action for damages by the person of and concerning whom the words are composed and published. (*Maynard v. F. F. Ins. Co.*, 34 *Cal.* 48.) Action will lie against a corporation for a libel published by its directors in the discharge of their office, and their malice is the malice of the corporation. *Maynard v. Fireman's Fund Ins. Co.*, 34 *Cal.* 48.

30. Malicious Prosecution.—An action for malicious prosecution, slander, false imprisonment, or assault and battery, cannot be maintained against a corporation aggregate, but must be brought against the individuals implicated personally. This is the practice in Missouri. *Childs v. Bank of Missouri*, 17 *Mo.* 213.

31. Members as Parties.—Where members of a corporation bring an action on behalf of the corporation, the complaint must allege that the officers whose duty it is to sue, have been requested to institute proceedings for that purpose, and have refused to do so. *Vanderbilt v. Garrison*, 3 *Barb.* 361; *House v. Cooper*, 16 *How. Pr.* 292.

32. Misnomer.—The misnomer of a corporation in a grant, obligation, or other written contract, does not prevent a recovery thereon by or against the corporation in its true name, providing its identity is averred and proved. *Melledge v. Boston Iron Co.*, 5 *Cush.* 158, 176; *Minot v. Curtis*, 7 *Mass.* 444; *Medway Cotton Manf. Co. v. Adams*, 10 *Mass.* 360; *Commercial Bk. v. French*, 21 *Pick.* 486; *Lowell v. Morse*, 1 *Met.* 473; *Charitable Association v. Baldwin*, 1 *Met.* 359.

33. Mode of Incorporation.—In New York, it was held that in an action by a domestic corporation, it is not necessary that the complaint should set forth the mode of plaintiff's incorporation, or recite the title and date under which the plaintiff was incorporated. (3 *N.Y.* 309; 28 *Barb.* 60; *Shoe and Leather Bank v. Brown*, 9 *Abb. Pr.* 218; S.C., 18 *How. Pr.* 308.) In Connecticut, it was held otherwise with respect to foreign corporations plaintiff. *Connecticut Bank v. Smith*, 9 *Abb. Pr.* 168.

34. "Person," Natural and Artificial.—The word "person" in its legal signification is a generic term, and is intended to include artificial as well as natural persons. (*Douglass v. P. M. S. S. Co.*, 4 *Cal.* 304.) Under the laws of California, corporations have a legal existence from the date of filing the certificate of incorporation in the County Clerk's Office. *Mokelumne Hill Min. Co. v. Woodbury*, 14 *Cal.* 424.

35. Powers.—It is not necessary to set forth the specific power of the corporation under which the transaction in question arose. (*Reformed Dutch Church v. Vedder*, 4 *Wend.* 494; *Struver v. Ocean Ins. Co.*, 2 *Hill.* 475; S.C., more fully reported, 9 *Abb. Pr.* 23; *Perkins v. Church*, 31 *Barb.* 84; *Marine and Fire Ins. Bank v. Jauncey*, 1 *Id.* 486; compare, however, *Camden and Amboy R.R. and Transportation Co. v. Remer*, 4 *Id.* 127; see, also, *Bard v. Chamberlin*, 3 *Sandf. Ch.* 31;) where it is said that the power of a foreign corporation to make the contract which is sought to be enforced must be set forth.

36. Promise.—In *assumpsit* against a bank, an averment that the defendant "promised through its president and cashier," without alleging their authority, is sufficient. The bank could not have promised, except through agents duly authorized. *Bk. of the Metropolis v. Guttchlick*, 14 *Pet.* 19.

37. Right to Act.—The right of a corporation to act cannot be collaterally inquired into. *Denneborg Mining Co. v. Allment*, 26 *Cal.*

286; see, also, *Rondell v. Fay*, 32 *Cal.* 354; *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 *Cal.* 620; *Natoma Wat. and Min. Co. v. Larkin*, 14 *Cal.* 544.

38. Trustees.—The trustees of a corporation should sue in the corporate name only. 1 *Kern.* 94; *Bundy v. Birdsall*, 29 *Barb.* 31.

39. Verification.—When a corporation is a party, the verification may be made by any officer thereof; (*Cal. Pr. Act*, § 55; *N.Y. Code*, § 157; *Arizona*, § 55; *Idaho, Id.*;) by an officer representing it, or by an agent or attorney thereof. *Oregon Code*, § 348; *Oregon Decis.* 79.

No. 44.

iii. *Against Corporation formed under the Act in relation to Roads and Highways.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a corporation created by and under the laws of this State, organized pursuant to an act of the Legislature entitled [*title of act in full*], passed, 18 . . . , and the acts amendatory thereof and supplementary thereto.

II. [*State a cause of action.*]

[*Demand of Judgment.*]

40. Form.—For a form of averment of incorporation in such actions, see *Oswego and Syracuse Plank Road Co. v. Rust*, 5 *How. Pr.* 390; *N.Y. Floating Derrick Co. v. N.J. Oil Co.*, 3 *Duer*, 648.

41. Parties.—The directors of a corporation formed for the construction of plank or turnpike roads, are not personally liable, unless the stockholders have adopted by-laws, and the same have been filed in the Recorder's Office, and the contract is made in violation of the by-laws. *Hall v. Crandall*, 29 *Cal.* 567.

No. 45.

iv. *By Corporation, on Stock Assessments.*

[TITLE.]

The plaintiff complains, and alleges:

I. That in pursuance of an act of the Legislature of the State of California, entitled "An Act" [*give the title of the act*], passed, 18. . ., and of the acts amendatory thereof and supplementary thereto, the above-named company was organized and formed into a corporation under the name of the Company.

II. That on the . . . day of, 18. . ., at, the defendant and certain other persons, being desirous of associating themselves together for the purpose of constructing a [*toll road, or state the actual purpose*] from the village of R. to the village of S., in said County, in consideration thereof, and of the mutual promises each to the other, and of the benefits to be derived from being members of said association, made and subscribed a certain agreement in writing, as follows, to wit:

[*Copy subscription paper, with subscribers' names, and add*], and other persons whose names are here omitted.

III. That the said defendant did, at the time of subscribing said agreement, set opposite to his name, thereto subscribed, the number of ten shares, and that the par value of each share is fifty dollars, and that said defendant agreed to take and pay for the same.

IV. That afterwards, to wit, on the . . . day of, 18. . ., at a regular meeting of the trustees of said Com-

pany, an assessment of five per cent. of the par value of each share of the capital stock of the said corporation was duly levied; that at the time of the levy of such assessment, defendant was a subscriber to the capital stock of said corporation in the amount of shares, of the par value of dollars, and was the owner of such stock.

V. That afterwards, etc. [*Allege the number of assessments defendant has failed to pay, each as above.*]

VI. That the defendant had due notice of each of the said assessments, made by the trustees of said Company as aforesaid, and that the same were duly published in the daily, a newspaper printed and published in the City of, for at least days, and in every respect according to law.

VII. That the whole sum of dollars is now due plaintiff from defendant, and no part thereof has been paid.

[*Demand of Judgment.*]

42. Assessments.—Under the laws of California, the stock may be sold to pay assessments, and such sale is authorized to be made without action.

43. Jurisdiction of Corporations.—For rules as to the jurisdiction of municipal corporations to make assessments for local improvements, see *Ireland v. City of Rochester*, 51 *Barb.* 414.

No. 46.

v. *By a Corporation, on a Stock Subscription.*

[TITLE.]

The plaintiff complains, and alleges :

I. [*Aver incorporation.*]

II. That in contemplation of the incorporation of these plaintiffs, and for the purpose of constructing, owning, and maintaining the [toll road], then contemplated, the defendant, with others, on the . . . day of, 187., at, became a subscriber to the stock of the said Company by [severally] signing and delivering an agreement in writing, of which the following is a copy: [*Copy subscription paper.*]

III. That, among other persons, the defendant signed and executed the said agreement, and set opposite to his name the sum of dollars, which he thereby agreed to pay to said Company.

IV. That after the defendant had thus subscribed, and on or about the day of, 187., he subscribed to the articles of association of said Company, his name and his place of residence, to wit,, and the number of shares of stock taken by him, to wit, shares, amounting to dollars, the shares of stock being dollars, each.

V. That the plaintiff by its directors, on the day of, 187., at, required the defendant to pay thereon the sum of, agreeably to said subscription and the charter and by-laws of the Company.

VI. That the plaintiff has performed all the conditions thereof on its part.

VII. That the defendant has not paid the said subscription.

[*Demand of Judgment.*]

44. Assessment, Averment of.—A complaint on a subscription to be paid as assessed, must aver a proper assessment. *Gebhart v. Junction R.R. Co.*, 12 *Ind.* 484.

45. Averment of Corporate Character.—A complaint which avers in general terms that the plaintiffs were an incorporated company, organized pursuant to the general act, is sufficient for any purpose. (*Oswego and Syracuse Plank Road Co. v. Rust*, 5 *How. Pr.* 390; but see *Dutchess Cotton Manf. Co. v. Davis*, 14 *Johns.* 238.) But the authority of the latter case is somewhat shaken by the criticism upon it in *Welland Canal Co. v. Hathaway*, 8 *Wend.* 480; see also *First Baptist Society v. Rapelee*, 16 *Wend.* 605.

46. Averment of Subscription.—It is sufficiently specific to allege that the party subscribed a sum named, and that the subscription was paid, and that the amounts paid were received by the company. *Peckham v. Smith*, 9 *How. Pr.* 436; see, also, *Highland Turnpike Co. v. McKean*, 11 *Johns.* 98.

47. Form.—For a form of complaint under the statutes of New York, see the case of *Poughkeepsie Plank Road Co. v. Griffin*, 21 *Barb.* 454; S.C., 15 *N.Y.* 583; *Oswego and Syracuse Plk. Rd. Co. v. Rust*, 5 *How. Pr.* 390.

48. Parties.—As to what parties can maintain an action against a defendant, treasurer of a religious corporation, for money received by him as subscriptions and donations for an enterprise not immediately connected with the church corporation, see *Rector*, etc., of the Church of the Redeemer *v. Crawford*, 5 *Rob.* 100.

49. Religious Corporations may sue for subscription. (*Dansville Seminary v. Welch*, 38 *Barb.* 221.) Trustees of such corporations must first establish their right, before they can use the corporate name. (*North Baptist Church v. Parker*, 36 *Barb.* 171.) Before the Court

can take notice of the regulations of particular religious denominations, or their nature or effect, their existence should be properly averred and proved as matter of fact. *Young v. Ransom*, 31 *Barb.* 49.

50. Separate Subscriptions.—Where defendant subscribed in his own name for fifty shares of railroad stock, and at the same time subscribed for fifty more, signing his own name again, adding thereto the letters, “Exr.,” to indicate that he took the additional fifty shares for an estate for which he was executor; *Held*, that these were separate contracts, upon which separate actions would lie; and that the pendency of the action to enforce payment of the first subscription formed no sufficient ground for abating the action to enforce the second subscription. *Erie and New York City R.R. Co. v. Patrick*, 2 *Keyes*, 256.

No. 47.

vi. *On a Subscription to the Expense of a Public Object.*

[TITLE.]

The plaintiff complains, and alleges:

I. [*Aver incorporation.*]

II. That the plaintiff, in the month of, 187., was erecting a building at, for the purposes of public worship.

III. That the defendants and others requested the plaintiff to complete the same, and for the purpose of enabling the plaintiff to do so, they subscribed and agreed to pay to the plaintiff the sum of dollars, in consideration of the premises, and of the like subscription and agreement of other persons.

IV. That upon the faith of said subscription, the plaintiff proceeded with the erection of the building, and expended thereon large sums of money, and incurred

large liabilities, and completed said building, and otherwise duly performed all the conditions on its part.

V. That the defendant has not paid said subscription.

[*Demand of Judgment.*]

51. Corporate Name.—An action for money due a church on a verbal contract with the trustees, should be brought in the corporate name, and not in the name of the trustees. *Barnes v. Perine*, 9 *Barb.* 202; *Leftwick v. Thornton*, 18 *Iowa*, 56.

52. Form.—For form under the New York Code, see *Richmondville Union Seminary, etc. v. Brownell*, 37 *Barb.* 535; *Wayne and Ontario Collegiate Institute v. Smith*, 36 *Id.* 576.

No. 48.

vii. *Against a Municipal Corporation.*

[STATE AND COUNTY.]

[COURT.]

<p style="text-align: center;">A. B., Plaintiff, <i>against</i> THE BOARD OF SUPERVISORS OF THE COUNTY OF</p>	}
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The plaintiff complains, and alleges:

I. That the defendant is a municipal corporation, created by the laws of this State.

II. [*State cause of action.*]

III. That on the day of, at, the plaintiff presented the claim or demand hereinbefore set forth to the Board of Supervisors of the County

of, for allowance, and that they failed and refused to allow the same or any part thereof.

IV. That the defendant has not paid the same.

[*Demand of Judgment.*]

53. Authority to Enact.—The authority to enact may be averred in general terms. Where a corporation is authorized to pass a by-law if they find it necessary, and they pass it, a declaration on the by-law need not aver the necessity. (*Stuyvesant v. Mayor, etc., of N.Y., 7 Cow. 588.*) The defect of omitting to plead the statute upon which its right to enact is founded would be matter of form, and should be disregarded, if no objection be made until the trial, and the adverse party be not surprised. *Beman v. Tugnot, 5 Sandf. 153.*

54. Bonds of Corporation.—In suit against a municipal corporation on its bonds, the complaint sets out the bonds; avers the defendant to be a corporation; that the corporation made and delivered the bonds on good consideration, under an ordinance passed by the proper agents of the corporation, having authority for that purpose, and that defendant has failed to pay. Complaint shows, *prima facie*, a liability on the part of the corporation; and it was not necessary to set out the ordinance, nor the vote, or other proceedings of the corporate agents, or give any further description of the agents of the corporation. *Underhill v. Trustees of the City of Sonora, 17 Cal. 172.*

55. Contract.—Where suit is brought on a contract made by a city, where the laws regulating it require the consent of two-thirds of its electors to validate debts for borrowed money, such consent need not be averred on the plaintiff's part. If with such sanction the debt would be obligatory, the sanction will, primarily, be presumed. Its non-existence, if it does not exist, is matter of defense, to be shown by the defendant. (*Gelpcke v. City of Dubuque, 1 Wall. U.S. 221.*) In an action against the City of St. Paul, on a contract for grading streets, it is not necessary to allege that an estimate of the expenses was filed by the commissioner, nor that the contract was made with the lowest bidder. *Nash v. St. Paul, 8 Minn. 172.*

56. Corporation must be Alleged.—It is an indispensable allegation, in an action brought by a corporation, that it is a corpora-

tion, and it results from the logic of pleading that the opposite party may deny the allegation. (*Oroville and Virginia City Railroad Company v. The Supervisors of Plumas County, Cal. Sup. Ct., Ap. T., 1869.*) A substantial compliance with the requirements of the statute will be sufficient to show a corporation *de jure* in an action between the corporation and a private person. *Oroville and Virginia City Railroad Company v. The Supervisors of Plumas County, Cal. Sup. Ct., Ap. T., 1869.*

57. Form.—For forms of complaint under the New York Code, see *Carman v. Mayor of N.Y., 14 Abb. Pr. 301*; *Doolittle v. Superv. of Broome, 18 N.Y. 155*; *Roosevelt v. Draper, 23 Id. 318.*

58. Injury by Negligence.—In what cases an action lies against a village for neglect to maintain sidewalks, (*Harrington v. Village of Corning, 51 Barb. 396.*) The person or persons upon whom the law may impose the duty either to repair a defect, or to guard the public from an excavation, embankment, or grading, and also the officer or officers through whose official neglect such defect continues, shall be jointly and severally liable. *Eustace v. Jahns, Cal. Sup. Ct., Jul. T., 1869.*

59. Nuisance.—If a city, in the exercise of its right to grade highways, creates a stagnant pond on a man's land, close to his house, it is liable in damages. *Ne vins v. City of Peoria, 41 Ill. 503.*

60. Presentation of Claim.—No action can be maintained against a municipal corporation in New York till such claim has been presented to the Comptroller. (*Laws of N.Y., 1860, ch. 379, § 2*; *Russell v. Mayor of N.Y., 1 Daly, 263.*) For somewhat similar statutes as to the necessary demand before a suit against the Cities of Brooklyn and Buffalo, respectively, see (*Howell v. City of Buffalo, 15 N.Y. 512*; *Hart v. City of Brooklyn, 36 Barb. 226.*) For similar statutes in California, see local acts. In New York, a second demand on the expiration of twenty days after the rejection of the claim, is required, and under that practice the following allegation is essential: That thereafter, on, etc., and after the expiration of twenty days, he made a second demand, in writing, upon the said, for the adjustment of the said claim; but the said has hitherto wholly neglected and refused to make an adjustment or payment thereof. See *Abb. Forms, No. 184.*, and authorities there cited.

No. 49.

viii. *By a County.*

[NAME OF COUNTY.]

[COURT.]

THE BOARD OF SUPERVISORS OF COUNTY, Plaintiff, <i>against</i> A. B., Defendant.
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The plaintiff, a corporation existing by [*or under*] the laws of this State, complains, and alleges:

I. [*State cause of action.*]

[*Demand of Judgment.*]

61. Actions by.—Under the act of 1854, p. 194, counties have the right of prosecuting and defending actions in the some manner as individuals. (*Laws of Cal.* 1854, p. 194; *Placer Co. v. Austin*, 8 *Cal.* 305.) That a county is a corporation, see (*Smith v. Myers*, 15 *Cal.* 33.) Counties are *quasi* corporations, and can sue and be sued. (*Price v. Sacramento Co.*, 6 *Cal.* 254; *People ex rel. Hunt v. Supervisors*, 28 *Id.* 431.) But the people of a county are not the corporation. *Smith v. Myers*, 15 *Cal.* 33.

62. Claims Presented.—The claim against a county must first be presented to the Board of Supervisors. (*Laws of Cal.* 1865–6, p. 856.) And the complaint must show that the claim has been first presented to the Board of Supervisors, and been by them rejected. (*McCann v. Sierra County*, 7 *Cal.* 123.) The right to sue a county is not limited to cases of tort, malfeasance, etc.; but is given in every case of account after presentation to, and rejection by, the Board of Supervisors. The complaint must aver such presentment. *Price v. The County of Sacramento*, 6 *Cal.* 254.

63. Complaints.—In our State, a complaint which alleges that the plaintiff, as a justice of the peace, performed services at the request of the District Attorney for the County, in cases wherein the people of

the State were plaintiffs, to the amount of thirty-two hundred dollars, and that defendant thereby became and is liable to pay the said sum, does not state facts sufficient to constitute a cause of action against said county. (*Miner v. Solano County*, 26 Cal. 115.) A complaint in an action against a county for damages sustained by the location of a public highway over plaintiff's land, laid out under the Act of 1861, fails to state a cause of action, unless it avers that the plaintiff had attempted to come to an agreement with the Board of Supervisors as to the amount of damages sustained, and could not agree with the Board as to such amount. *Lincoln v. Colusa County*, 28 Cal. 662.

64. County as Plaintiff.—A suit brought for or against a county shall be by or in the name of such county. (*Laws of Cal.* 1855-6, p. 856; *Smith v. Myers*, 15 Cal. 33; *Placer Co. v. Astin*, 8 Cal. 305.) So held in an action on a recognizance. (*Mendocino Co. v. Lamar*, 30 *Id.* 627.) So, also, in an action for the recovery of money from a defaulting treasurer. (*Sacramento Co. v. Bird*, 31 Cal. 66; *Mendocino Co. v. Morris*, 32 Cal. 145.) Or to recover money belonging to the General County Fund. (*Solano Co. v. Nevill*, 27 Cal. 468; *Sharp v. Contra Costa Co.*, 34 Cal. 284.) So, an action may be maintained in the name of the County, upon a note payable to the County, to the use of the State School Fund. (*Barry County v. McGlothlin*, 19 *Mo.* 307.) A county is a corporation, and is the proper party plaintiff to object to a contract made by Board of Supervisors for building a jail. *Smith v. Myers*, 15 Cal. 33.

65. County as Defendant.—That counties may be made defendants, see (*Price v. Sacramento Co.*, 6 Cal. 254; *People v. Supervisors*, 28 *Id.* 431; *McCann v. Sierra Co.*, 7 *Id.* 121; *Waitz v. Ormsby Co.*, 1 *Nev.* 370; *Lyell v. Lapeer Co.*, 6 *McLean S. Ct.* 446.) Proceedings by *mandamus* against county officers are properly brought in the name of the County. (*Calaveras Co. v. Brockway*, 30 Cal. 325.) A proceeding to compel the supervisors to exercise their discretion in auditing a claim against the County, should not be against the supervisors individually. (*People v. Supervisors of Cortland*, 24 *How. Pr.* 419.) In actions against counties, suit should be brought against supervisors. *Wild v. Super. of Columbia Co.*, 9 *How Pr.* 315.

66. Medical Care of Sick.—A complaint in an action against a county to recover for medical care and treatment of sick persons, fails to state a cause of action if it does not aver that the sick persons treated

were indigent persons, and residents of the county. *Johnson v. Santa Clara Co.*, 28 *Cal.* 545.

67. Medical Services.—When in an action against a corporation for the value of medical services rendered its employees, the petition did not allege any promise by the defendant, or any fact by which the law would imply a promise, it was *held* defective. An allegation that the services were rendered at the instance and request of the agent of the defendant, is not an averment that they were rendered at the instance and request of the defendant. *Wells v. Pacific Railroad*, 35 *Mo.* 164.

68. Supervisors, Liabilities of.—Boards of supervisors cannot be sued in their official character, in ordinary common law actions, for claims against the public, county, or village, without express statutory provision. (*Hastings v. City and County of San Francisco*, 18 *Cal.* 49.) Where the Board of Supervisors consists of three members, at least two must be joined as defendants in an action to enjoin them. *Trinity Co. v. McCammon*, 25 *Cal.* 119.

69. Under New Charter.—A complaint against a municipal corporation existing under a new charter and name, for work and labor done for the same town under a former charter and name, must aver that the new incorporation is liable for the debts of the old. *Lyles v. Common Council of Alexandria*, 1 *Cranch.* 473; see, further, *Clearwater v. Meredith*, 1 *Wall. U.S.* 25.

No. 50.

ix. *Against Trustees of a Corporation for Neglect to File Report.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the defendants were trustees of the Company.

II. That at the time hereinafter mentioned, said Company was a corporation organized pursuant to an act of the Legislature of this State, entitled "An Act," etc. [*here insert title of act*], passed, 18.., and the acts amending the same.

III. That on the day of, 187., and before the time for filing the annual report hereinafter mentioned [*or* after the time for filing the annual report hereinafter mentioned, and before it was filed], said Company became indebted to the plaintiff in the sum of dollars, upon an account for work, labor, and services rendered by the plaintiff and his servants to said Company at their request, and for money paid by him to the use of said Company at their request, in advertising in various newspapers in the United States and British Columbia the goods manufactured and offered for sale by the said corporation [*or* state other indebtedness], and although the same became due and payable on said day [*or* on the day of, 187.], no part thereof has been paid.

IV. That the said Company did not within days from the first day of January, 187., make and publish [nor have they at any time whatever since their organization made and published] a report as required by law in such case made and provided, verified by the oath of the president or secretary thereof, and file the same in the Office of the Clerk of the County where the business of the Company was carried on; nor did they make, publish, sign, cause to be verified, and file any such report whatsoever until after the [*designating time when it is alleged the debt was contracted*]; nor have they either made, published, signed, verified, or caused to be verified, or filed any such report as by law required, but wholly failed to do so.

[*Demand of Judgment.*]

NOTE.—This form is not specially applicable to the practice in California, and is taken from "Abbots' Forms," No. 633.

70. Neglect of Duty.—That the annual report required by law was not made within twenty days from the first of January, 1855, nor at any time since, is a sufficient allegation of neglect to file report in 1858. *Andrews v. Murray*, 9 *Abb. Pr.* 8.

71. Personal Liability.—As to the personal liability of trustees of a corporation, consult (*Gen. Laws of Cal.*, ¶ 806); or of a stockholder for the abuse of his trust, and the requisites of pleading in such cases, see (*Robinson v. Smith*, 3 *Paige*, 222; *Cunningham v. Pell*, 5 *Id.* 607; *Austin v. Daniels*, 4 *Den.* 299; *Scott v. Depeyster*, 1 *Edw.* 513; *Franklin Fire Ins. Co. v. Jenkins*, 3 *Wend.* 130; *Gaffney v. Colvill*, 6 *Hill*, 567; *Cazeauz v. Mali*, 25 *Barb.* 578.) Liability for debts does not include a claim for damages for negligence. *Heacock v. Sherman*, 14 *Wend.* 58.

72. That Defendants were Trustees.—It is the better practice to allege this explicitly. *Andrews v. Murray*, 9 *Abb. Pr.* 8.

73. Time of Existence of Debt.—It must be averred that the debt was existing at the time of the failure to publish the annual certificate, or that it was contracted afterwards before such report was published. *Chambers v. Lewis*, 16 *Abb. Pr.* 433.

No. 51.

x. *Against the Trustees of a Dissolved Corporation, for an Accounting.*

[TITLE.]

The plaintiff, on behalf of himself as well as of all other creditors of the Company who may come in and contribute to the expenses of this action, complains, and alleges:

I. That the Company was incorporated on the . . . day of, 187., under the "Act" [*title of act*] passed, 187., and the acts amending the same.

II. [*State cause of action.*]

III. That on the day of, 187., the trustees of the said Company passed a resolution, of which a copy is hereto annexed, pursuant to an act entitled "An Act" [*title of act, or allege any act which virtually dissolves the corporation and vests assets in the trustees*].

IV. That the defendants were the trustees of the said Company at the time of passing the said resolution.

V. That the defendants have received a large amount of money and other property belonging to the said Company, but have refused to pay the claim of the plaintiff.

Wherefore, the plaintiff demands judgment:

1. That the defendants account, under the direction of the Court, for the property received by them as aforesaid.

2. For the payment to him of dollars, with interest from the day of, 187., and costs, out of the funds in possession of the defendants, or which they may collect.

3. That the defendants, without delay, proceed to the discharge of the trusts devolved upon them in the premises.

74. Cause of Action.—Where the debt is a judgment for costs, the cause of action may be alleged as follows: II. That on, etc., at, the said corporation, by a resolution of its trustees, of whom defendant was one, instituted an action against the plaintiff in, etc., and thereupon such proceedings were had that the said Court on, etc., dismissed said complaint, with costs, and that said costs were afterwards on, etc., duly adjusted and taxed at the sum of, etc., and judgment entered therefor in the Office of the Clerk of County, which judgment remains unpaid. *Andrews v. Murray*, 9 *Abb. Pr.* 8.

75. Dissolution by Surrender.—In “*Angel & Ames on Corporations*” (§ 772), after announcing that some doubt has existed in England touching the power of a municipal corporation to surrender its corporate existence, the author concludes that “by far the better opinion is, that where the surrender is duly made and accepted, it is effectual to dissolve a municipal body. In this country, the power of a private corporation to dissolve itself by its own assent seems to be assumed by all judges upon the point.” The authorities quoted in support are, *Riddle v. Proprietors of Locks, etc.*, 7 *Mass.* 185; *Hampshire v. Franklin*, 16 *Mass.* 86; *McLaren v. Pennington*, 1 *Paige*, 107; *Enfield Toll Bridge Company v. Connecticut Railroad Company*, 7 *Conn.* 45; *Sloe v. Blum*, 19 *John*, 456; *Canal Company v. Railroad Company*, 4 *Gill & J.* 1; *Trustees, etc. v. Zanesville C. and M. Company*, 9 *Ohio*, 203; *Penobscot Boom Company v. Sampson*, 16 *Maine*, 224; *Mumma v. Potomac Company*, 8 *Pet.* 281; *The People of the State of California v. President and Trustees of the College of California*, *Cal. Sup. Ct., Jul. T.*, 1869.

76. Insufficient Averment.—A complaint against a trustee of a moneyed corporation is bad, if it shows that the wrongful acts of the defendant were committed before the corporation incurred any obligation to the plaintiff. *Ogden v. Rollo*, 13 *Abb. Pr.* 300.

77. Liability of Trustees or Receivers.—Trustees or receivers shall be jointly and severally responsible to the creditors and stockholders, to the extent of its property and effects in their hands. *Genl. Laws of Cal.* ¶ 762.

78. Surrender of Corporate Powers.—CHANCELLOR KENT says: “The better opinion seems to be that a corporation aggregate may surrender, and in that may dissolve itself; but then the surrender must be accepted by the Government, and be made by some solemn act to render it complete.” 2 *Kent's Com.* 311; *The People of the State of California v. President and Trustees of the College of California*, *Cal. Sup. Ct., Jul. T.*, 1869.

79. Surrender by Trustees.—That the trustees have the power to surrender the franchise, after its debts are paid, is a proposition which admits of no doubt; and if they should do so without having made any disposition of its property, there being no stockholders or creditors, the personal property of the corporation would vest in the State. 2 *Kent Com.* 386; *Angel & Ames on Corp.* § 195; *People v.*

President and Trustees of the College of California, *Cal. Sup. Ct., Jul. T., 1869.*

80. Trustees, Appointment of.—Upon the dissolution of a corporation, unless other persons are appointed by the Legislature or by a court of competent authority, the directors or managers of the corporation shall be trustees of the creditors and stockholders. *Gen. Laws Cal.* ¶ 761.

81. Trustees, Power of.—Such trustees or receivers may sue and recover the debts and property of the dissolved corporation. (*Gen. Laws of Cal.* ¶ 762.) And where a common-law receiver sues in the name of the corporation, the declaration must aver that the suit is brought by the direction of the receiver. (*Bank of Niagara v. Johnson*, 8 *Wend.* 645.) So, when a receiver is appointed, and the assets are assigned to him, even if the corporation is still in being. *Bk. of Lyons v. Demmon*, *Hill & D. Supp.* 398.

No. 52.

xi. *Against Director of Insurance Company—Grounds of Unlawful Dividends and Transfers of Assets.*

[TITLE.]

The plaintiff complains, and alleges:

I. That from the day of, 186., to the day of, 187., the Company was a corporation existing by virtue of the laws of this State, and authorized by law to make insurances.

II. That during the said time, the said corporation made insurances for plaintiff, in the sum of dollars, on two vessels, viz., dollars on a vessel named the "Brother Jonathan," and dollars on a vessel named the "Central America;" both of which vessels became total losses, within the meaning of said policies of insurance, and during the voyages for which such insurances were made. And that the amounts of such insurance have not been paid.

III. That at a meeting of the board of trustees of said corporation, at which defendant was present, during the time aforesaid, the defendant, with the other trustees, made dividends to the stockholders of the said corporation, which dividends were not made from the surplus profits arising from the business of said corporation.

IV. That at a meeting of the board of trustees of said corporation, at which the defendant was present, and when the said corporation was insolvent and in contemplation of insolvency, the defendant, with the other trustees, made conveyances, assignments, and transfers of the assets and property of said corporation, with the intent of giving a preference to particular creditors of said corporation over other creditors of said company.

V. That the plaintiff is, and was, at the times of the aforesaid acts, a creditor of said corporation for the sum of dollars, as aforesaid, and the defendant then was a trustee of said Company. That in consequence of the wrongful acts and violations of law by the defendant, with the other directors of said corporation hereinbefore mentioned, the said corporation, prior to said day of, and while the plaintiff was such creditor, and the defendant such trustee, became, and now is, wholly insolvent; that plaintiff has sustained loss by reason thereof in the sum of dollars.

[*Demand of Judgment.*]

82. Essential Averment.—It should appear that the plaintiff was a creditor of the corporation at the time the wrongful acts and violation of law complained of are alleged to have been done or committed. *Ogden v. Rollo*, 12 *Abb. Pr.* 300.

83. Grounds of Action.—The complaint may set forth several grounds, on either of which the defendants would be liable. *Durant v. Gardner*, 10 *Abb. Pr.* 445; *S.C.*, 19 *Hew. Pr.* 94.

84. Statute.—But when two different statutes severally authorize an action upon a certain state of facts, the arising of such state of facts constitutes but one cause of action; and a plaintiff must elect which statute he will proceed under; and cannot complain upon the same facts in two counts, one under each statute. *Sipperly v. Troy and Boston R.R. Co.*, 9 *How. Pr.* 83.

No. 53.

xii. *Individual Creditor against Individual Stockholder.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the Company is now, and since the day of, 187., has been a corporation existing under and by virtue of the laws of this State, for the purpose of mining for silver and other precious metals, and that the principal place of business of the said corporation is, and since the said day of, 187., has been in the City and County of San Francisco, and State of California.

II. That the capital stock of said corporation is, and since the said day of, 187., has been limited to shares, of the par value of dollars per share; making a total capital of dollars.

III. That the whole of said capital stock of said corporation was and is issued to and owned by various persons, who are now and have been such owners of said stock since the day of, 187.; and that the full amount thereof has been paid into said corporation by said stockholders, and that all amounts paid in by said stockholders have been expended, and that nothing now remains to pay the claims of the

creditors of the said corporation, and that said corporation is insolvent.

IV. That on the day of, 187., the defendant gave its promissory note to one A. B. for the sum of dollars, payable in gold coin, with interest at per cent. per month, a copy of which is hereto annexed, marked "Exhibit A."

V. That said note was afterwards endorsed to the plaintiff by the said A. B.

VI. That on the day of, 187., at, the defendant made its acceptance in writing for the sum of dollars in gold, with interest from date also payable in gold, for supplies furnished by the plaintiff, to said corporation, at its special instance and request, and delivered the same to the plaintiff.

VII. That on the day of, at, the defendant made its certain other acceptance in writing for the sum of dollars, payable to the plaintiff in gold coin, with interest at the rate of per cent. per month, from date, payable in gold coin, for supplies and money furnished by the plaintiff to said corporation at its special instance and request.

VIII. That on or about the day of, in the District Court of the Judicial District, County of, in this State, the plaintiff commenced an action against the defendant for the sum of dollars, principal and interest due upon said note and acceptances, and for costs and damages, all in gold coin.

IX. That afterwards, on the day of, 187., personal service of summons and certified copy of complaint in said action was made on the said Company.

X. That afterwards, to wit, on the day of, 187., judgment was rendered in the said action against the defendant for the full amount of dollars, in United States gold coin.

XI. That afterwards, to wit, on the day of, 187., execution was issued in the said action upon said judgment by the Clerk of the said Court, and addressed to the Sheriff of the said City and County of San Francisco, and which execution was thereupon delivered to said Sheriff, and on the day of, 187., he returned the same wholly unsatisfied, and that no property could be found within the said County belonging to said Company.

XII. That the defendant has not paid the said judgment, and that it still remains in full force and effect, unsatisfied, unreversed, and not appealed from; and that the plaintiff is the owner thereof.

XIII. That ever since the day of, 187., and also at and during the time when the said debts and liabilities, for said moneys advanced and supplies furnished, accrued and were contracted and incurred by said corporation, as well as at the time, when the said judgment was obtained, and the said note given and acceptances made, the defendant was a stockholder in the said corporation to the amount of shares of the capital stock of said corporation.

XIV. That the total amount of indebtedness of the said corporation is dollars.

XV. That the proportion of said indebtedness, for which defendant is liable to plaintiff, is dollars per share, in United States gold coin, amounting to the full sum of dollars in gold coin, with interest

at the rate of per cent. per month, and payable in gold coin, on dollars of the above amount sued for, and interest at the rate of per cent. per month, in gold coin, upon the sum of dollars, the remainder of the above amount sued for.

XVI. That although often requested, still defendant has failed, neglected and refused to pay the same, or any part thereof.

Wherefore plaintiff demands judgment against the defendant for the sum of dollars in United States gold coin, and interest on the sum of dollars at the rate of per cent. per month, compounded monthly, payable in like gold coin, and interest on the sum of dollars at the rate of per cent. per month, in United States gold coin, and for costs of suit.

[*Exhibit "A." Annexed.*]

85. Action, Joint or Several.—A joint or several action may be brought against stockholders of a corporation for corporate debts. (*Larrabee v. Baldwin*, 35 *Cal.* 156.) In an action of debt against a stockholder, a general *indebitus* count before the Code was sufficient, alleging that the company was indebted, etc., for, etc., and payment had been refused although the debt of the company arose under a special contract. *Simonson v. Spencer*, 15 *Wend.* 548.

86. Discharge of Liability.—Each stockholder of a corporation formed under the Act of 1853, is liable for his proportion of the corporate debts, and any one creditor whose debt is sufficient, may collect of him the entire amount of his liability on all the corporate debts, leaving him to seek contribution out of his co-stockholders. When such stockholder has paid to any one or more creditors the amount of his entire liability, his liability ceases. *Larrabee v. Baldwin*, 35 *Cal.* 156.

87. Enforcing Personal Liability.—An action to enforce the personal liability of stockholders is in many cases to be considered as

founded on that vestige of the relation of partnership between the members of the company which the charter or general act failed to remove. *Corning v. McCullough*, 1 *N.Y.* 47; *Conant v. Van Schaick*, 24 *Barb.* 87; *Simonson v. Spencer*, 15 *Wend.* 548; *Bailey v. Banker*, 3 *Hill.* 188.

88. Form.—For a form of complaint against stockholders of a corporation, see *Herikmer Co. Bk. v. Furman*, 17 *Barb.* 116; and *Witherhead v. Allen*, 28 *Id.* 661.

89. Individual and Personal Liability.—Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company *contracted or incurred during the time* that he was a stockholder. (*Laws of Cal.* 1853, pp. 90, 92; *French v. Teschmaker*, 24 *Cal.* 543; *Mok. Hill Canal Co. v. Woodbury*, 14 *Cal.* 265.) The act of the Legislature making each stockholder liable for the debts of the corporation, corresponds with the requirements of the Constitution, Art. iv. § 36. *Larrabee v. Baldwin*, 35 *Cal.* 166.

90. Insolvency.—It is not necessary to aver that the corporation was insolvent. *Perkins v. Church*, 31 *Barb.* 84.

91. Judgment.—The plaintiff must prove not only a judgment and execution unsatisfied, but also that the judgment was upon a debt for which the corporators were individually liable. (*Conant v. Van Schaick*, 24 *Barb.* 87.) As to whether a stockholder is liable for the cost of the judgment against the company, *Bailey v. Banker*, 3 *Hill.* 188; *Andrews v. Murray*, 9 *Abb. Pr.* 8.

92. Judgment not a Contract.—Though a stockholder is individually liable for debts contracted while he was a stockholder, yet a judgment recovered against the corporation while he is a stockholder, upon a contract entered into before he became such stockholder, is not a contract within the meaning of the act rendering such stockholder liable. (*Larrabee v. Baldwin*, 35 *Cal.* 156.) And proof of a judgment against a corporation does not show when the debt was contracted. *Id.*

93. Liability, Nature of.—The individual liability of the stockholder is a constituent element in the artificial life of the corporation, made so by the author of its creation, and that life can no more exist under the Constitution without this element than a natural person can exist without an element made indispensable to his existence by the

laws of his nature. (*French v. Teschmaker*, 24 *Cal.* 545.) A stockholder is primarily liable. The same identical act which casts the liability on the corporation, also casts it on the stockholder. *Prince v. Lynch*, *Cal. Sup. Ct., Jul. T.*, 1869.

94. Liability, how Pleaded.—In an action against stockholders, the grounds on which they are individually liable must be shown. (*Geery v. N.Y. and Liverpool S.S. Co.*, 12 *Abb. Pr.* 268.) And in pleading the amount of a stockholder's liability, it must be averred that such stockholder held an amount of stock equal to the amount for which he is sought to be held liable. *Chambers v. Lewis*, 16 *Abb. Pr.* 433.

95. Liability Qualified.—The personal liability of *stockholders*, is an original liability; and an action against them is upon a contract made by them in a qualified corporate capacity; but where the corporate capacity is not thus qualified, the members or officers are not thus liable as original or principal debtors, by reason of something imposed on them by the statute, and the action must be upon the statute, to recover a debt in the nature of a forfeiture. *Bird v. Hayden*, 2 *Abb. Pr. (N.S.)* 61.

96. Liability Regulated by Statute.—The constitution leaves to the Legislature the power to regulate the liability of stockholders, and to prescribe the rule by which each stockholder's proportion of such debts shall be ascertained. *Larrabee v. Baldwin*, 35 *Cal.* 155; citing *French v. Teschmaker*, 24 *Cal.* 539.

97. Manufacturing and Mining Corporations.—The Act of 1853 repealed the Act of 1850, so far as it relates to corporations for "manufacturing, mining, mechanical, or chemical purposes, or for the purpose of engaging in any species of trade or commerce." *Larrabee v. Baldwin*, 35 *Cal.* 156.

98. Measure of Liability.—To determine how much any one stockholder is liable to pay to a corporate creditor, it is necessary to find the whole amount of the indebtedness of the corporation, created while he was a stockholder; and any one creditor, whose demand is large enough, may have judgment for the stockholder's proportion of such corporate debts. *Larrabee v. Baldwin*, 35 *Cal.* 156.

99. Uncanceled Debts.—There is nothing in the Constitution that renders a man who becomes a stockholder personally liable, by so

doing, for his proportion of all the uncanceled debts of the corporation, created before he became a stockholder. *Larrabee v. Baldwin*, 35 *Cal.* 156.

100. Parties in Equity.—A stockholder may sue in equity for an account making the corporation and trustees alone parties—no objection being taken that all the stockholders were not parties. (*Neall v. Hill*, 16 *Cal.* 145.) One stockholder cannot recover against another a debt due from the company. *Bailey v. Bancker*, 3 *Hill*. 188; compare *Simonson v. Spencer*, 15 *Wend.* 548.

101. Promissory Note.—It is unnecessary for the plaintiff to aver the facts showing for what the note was given. *Gebhard v. Eastman*, 7 *Minn.* 56.

102. Statute Liability.—In an action against stockholders of a corporation, to charge them with a statute liability for a debt of the corporation, the complaint must show that the defendants were such stockholders at the time at which the debt was contracted. (*Young v. N.Y. and Liverpool U.S. Mail S. S. Co.*, 15 *Abb. Pr.* 69; see, also, *Geery v. N.Y. and Liverpool U.S. M. S. S. Co.*, 12 *Abb. Pr.* 268.) It is not necessary to aver that the corporation was insolvent. *Perkins v. Church*, 31 *Barb.* 84.

103. Stockholders, Who are.—One who never accepts, but refuses to accept any stock in a corporation, is not a stockholder, even though the secretary enters his name in the books as such. (*Mudgett v. Horrell*, 33 *Cal.* 25.) A stockholder in a corporation is a party. 28 *Barb.* 503.

104. That Defendant was a Stockholder.—The complaint must show that defendant was a stockholder at the time the debt was contracted. (*Young v. N.Y. and Liverpool Steamship Co.*, 15 *Abb. Pr.* 69; *Tracy v. Yates*, 18 *Barb.* 152.) And an averment to this effect in the words of the charter is sufficient. *Freeland v. McCullough*, *Den.* 414.

105. Transfer of Stock.—Transfers of stock which have not been entered on the books of the company are valid as against all the world, except subsequent purchasers in good faith without notice. *Weston v. Bear R. and Aub. Wat. and Min. Co.* 5 *Cal.* 186; *S.C.*, 6 *Id.* 425; and *Naglee v. Pacif. Wharf Co.*, 20 *Cal.* 529; construing *Stat. of Cal.* 1853, p. 87; *People v. Elmore*, 35 *Cal.* 653.

*No. 54.*xiii. *The Same; Shorter Form.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereafter mentioned, the Company was a corporation created by and under the laws of this State, organized pursuant to an act entitled "An Act," [*title of act*] passed, 187., and the acts amending the same and supplementary thereto.

II. That on the day of, 187., said Company, by its agent duly authorized thereto, made its promissory note dated on that day, a copy of which is hereto annexed, marked "Exhibit A."

III. That on the day of, 187., in an action in the District Court of the Judicial District, for the County of to recover the same from said Company, judgment was rendered by said Court against said Company, in favor of the plaintiff for dollars, being dollars, the amount due thereon, with interest, amounting to dollars, and costs.

IV. That execution thereon was thereafter issued against said Company, and returned wholly unsatisfied.

V. That at the time said debt was contracted, the defendant was a stockholder of said Company, holding stock therein to the amount of dollars, being shares of the par value of dollars each; and that he still is such stockholder therein.

[*Demand of Judgment.*][*Exhibit "A" Annexed.*]

CHAPTER IV.

EXECUTORS, ADMINISTRATORS AND TRUSTEES.

No. 55.

i. *By an Executor.*

[STATE AND COUNTY.]

[COURT.]

A. B., Executor of the will of C. D. deceased, Plaintiff, <i>against</i> JOHN DOE, Defendant.
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The plaintiff complains, and alleges:

I. [*State cause of action.*]

II. That the said C. D. in his lifetime made and published his last will, whereby he appointed the plaintiff executor thereof.

III. That on the day of, 187., at, the said C. D. died.

IV. That on the day of, 187., at, said will was proved and admitted to probate, in the Probate Court in the County of, in this State.

V. That thereupon on the day of, 187., letters testamentary were issued on the said will to the plaintiff, by the Probate Judge of said County.

VI. That thereupon the plaintiff duly qualified and entered upon the discharge of his duties as executor, and that said letters testamentary have not been revoked.

[*Demand of Judgment.*]

1. Action, how Brought.—As to when an action by an executor should be brought in a representative, and when in an individual capacity, see *Lyon v. Marshall*, 11 *Barb.* 241; *Merritt v. Seaman*, 6 *N.Y.* (2 *Seld.*) 168; *Mowry v. Adams*, 14 *Mass.* 327; *Talmadge v. Capel*, 16 *Id.* 73; *Biddle v. Wilkins*, 1 *Pet.* 692; *Curtis v. Dutton*, 4 *Sandf.* 719.

2. Appointment.—A complaint averring that the plaintiff has been duly appointed and qualified by the Surrogate of New York to act as the “sole executor of A. B., deceased,” is not sufficient in an action to recover a demand due to the estate of the plaintiff’s testator. (*Forrest v. Mayor of N.Y.*, 13 *Abb. Pr.* 350.) A will contained these words: “I leave the sum of one sovereign each to the executor and witness of my will, for their trouble in seeing that everything is justly divided,” but did not name any executor. Beneath the signature of the testator, and opposite the names of the attesting witnesses, were the words, “executors and witnesses.” Held that there was no appointment of executors. *Woods, Law Rep.* 1 *P. & D.* 556.

3. Appointment, how Alleged.—The allegation that plaintiff was “duly appointed,” was held to be not insufficient, but indefinite, in (*Cheney v. Fisk*, 22 *How. Pr.* 238; *People v. Walker*, 23 *Barb.* 305; see, also, 23 *Id.* 143; *Cruger v. Halliday*, 3 *Edw. Ch. R.* 570; *People v. Ryder*, 2 *Kern.* 433; *Farmers’ Bank v. Empire Stone Dressing Co.*, 10 *Abb. Pr.* 47; *French v. Willet*, *Id.* 102; see, also, 2 *Id.* 422; *Id.* 405; 5 *Id.* 482; 6 *Id.* 243; *Hoyt v. Thompson’s Exr’s*, 19 *N.Y.* 208.) The time and mode of appointment were held essential in *Dayton v. Connah*, 18 *How. Pr.* 326.

4. As Executor.—In New York, the word “as” is essential in the title to the action, nor can it be easily replaced by any other word. Thus, a declaration which invariably and more than a dozen times mentioned the plaintiff as “the said Sarah, executrix as aforesaid,” closing with profert of letters testamentary, was held to be fatally defective under the old practice. (*Henschall v. Roberts*, 5 *East.* 151,

154.) The same rule has been settled in the Court of Appeals. (Compare *Merrit v. Seaman*, 6 *N.Y.* (2 *Seld.*) 168; with *Smith v. Levinus*, 8 *N.Y.* (4 *Seld.*) 474; and see, also, *Gould v. Glass*, 19 *Barb.* 185; *Sheldon v. Hoy*, 11 *How. Pr.* 14; *Ogdensburgh Bank v. Van Rensselaer*, 6 *Hill.* 241.) If the plaintiff's character is thus stated in the title, it is not necessary to repeat it, but he may afterwards be called "the plaintiff." See *Stanley v. Chappell*, 8 *Cow.* 235; *Ketchum v. Morrell*, 2 *N.Y. Leg. Obs.* 58; but compare *Christopher v. Stockholm*, 5 *Wend.* 36.

5. Authority to Sue.—An executor or administrator may bring suit without special authorization of the Probate Court (*Halleck v. Mixer*, 16 *Cal.* 579; *Rector v. Ranken*, 1 *Mo.* 371), at any time before a decree of distribution is made by the Probate Court. (*Curtis v. Sutter*, 15 *Cal.* 259; *Teschemaker v. Thompson*, 18 *Cal.* 20.) As all property real and personal goes into the hands of the administrator, he is a necessary party to all suits affecting it. *Harwood v. Marye*, 19 *Cal.* 87.

6. Essential Averments.—The complaint should state: *First*, The death of testator. *Second*, His leaving a last will and testament. *Third*, The appointment therein of the plaintiffs, as executors. *Fourth*, The probate of the will. *Fifth*, The issuance of letters testamentary thereon to the plaintiffs (*Thomas v. Cameron*, 16 *Wend.* 579), and their qualification and entry upon the discharge of their duties as executors. *Halleck v. Mixer*, 16 *Cal.* 574.

7. By whom Appointed.—Executors and administrators can sue and be sued as such only in the state in which they are appointed; therefore the averment *by whom letters were granted* is essential. (*Morrell v. Dickey*, 1 *Johns. Ch. R.* 156; *Williams v. Storrs*, 6 *Id.* 353; *Campbell v. Tousey*, 7 *Cow.* 68; *Vroom v. De Horn*, 10 *Paige*, 550; *Vermilyea v. Beatty*, 6 *Barb.* 429; *Smith v. Webb*, 1 *Id.* 230; *Séré v. Coit*, 5 *Abb. Pr.* 482; *Warren v. Eddy*, 13 *Id.* 23; *Gulick v. Gulick*, 21 *How. Pr.* 22; *Robins v. Wells*, 26 *Id.* 15; *Rightmeyer v. Raymond*, 12 *Wend.* 51; *Morgan v. Lyon*, *Id.* 265.) It would appear that in New York, a foreign executor may foreclose a mortgage in that State, without taking out letters there. *Averell v. Taylor*, 5 *How. Pr.* 486.

8. Capacity must be Alleged.—Where there is nothing further in the complaint to indicate in what capacity the plaintiff sued than simply the title, "A. B., Administrator," etc., it is insufficient to indi-

cate the capacity, and the action must be regarded as brought in the plaintiff's own right. (*Sheldon v. Hoy*, 11 *How. Pr.* 12; *Root v. Price*, 22 *How. Pr.* 373; *Butterfield v. McComber*, *Id.* 150; *Hallett v. Harrower*, 33 *Barb.* 537.) In Illinois, the qualification of executors may be shown by profert of letters testamentary. (33 *Ill.* 388.) In Missouri, a petition stating the character in which the plaintiff sued, and the indebtedness to the intestate, and praying judgment for the debt, is a sufficient statement of the cause of action and of the right to sue. *Duncan v. Duncan*, 19 *Mo.* 368.

9. Death of Testator.—A complaint not averring in direct terms, either previously or subsequently, the fact of the testator's death, or that he left a last will and testament, is defective as a pleading. (*Halleck v. Mixer*, 16 *Cal.* 574.) A distinct averment of the testator's death is proper. *Halleck v. Mixer*, 16 *Cal.* 574.

10. Jurisdiction to Appoint.—The Surrogate's (Probate Court) jurisdiction is all that need be shown. (*Emery v. Hildreth*, 2 *Gray*, 228; *Bloom v. Burdick*, 1 *Hill*, 134.) And this is sufficiently pleaded by the use of the word "duly." The executor's authority to sue depends solely upon the letters testamentary. *Thomas v. Cameron*, 16 *Wend.* 580.

11. Parties.—The executor, administrator, or trustee, may sue without joining the party beneficially interested. (*Cal. Pr. Act*, § 6.) So, in ejectment. (18 *Cal.* 11.) Or in foreclosure of mortgage. (*Burton v. Lies*, 21 *Cal.* 87.) So, also, in actions generally. See *Parties*, Chapter iv., pp. 78, 79 and 80.

12. Profert of Letters.—Representative capacity of the executor or administrator should be averred; and it is not necessary to make profert of letters testamentary or of administration. *Bright v. Currie*, 5 *Sand.* 433; *Wells v. Webster*, 9 *How. Pr.* 251; *Renard v. Conselyea*, 4 *Abb. Pr.* 280; *Worden v. Worthington*, 2 *Barb.* 368.

13. Promise.—Promises made to the *testator* should not be stated as made to "*the plaintiff*." *Worden v. Worthington*, 2 *Barb.* 370; *Christopher v. Stockholm*, 5 *Wend.* 36.

14. Proof of Will.—A bill alleging that there was an instrument purporting to be the last will and testament of M., deceased, duly executed and attested; that it was admitted to probate as such will; that

letters testamentary were issued, and that the executors took upon themselves the execution of the instrument, sufficiently shows that the instrument was a will, and had been so adjudged by the Surrogate's Court. *Mason v. Jones*, 13 *Barb.* 461; *Van Cortlandt v. Beekman*, 6 *Paige*, 492.

15. Qualifications.—Before receiving letters testamentary or of administration, the executor or administrator shall give bonds, etc., unless otherwise expressly provided in the will. *Cal. Probate Act*, §§ 72–86.

16. Representative Character.—In New York, a complaint which describes plaintiff as an executor, and states the cause of action as an indebtedness due to the plaintiff *as executor*, and that the money was had and received by the defendant for the use of the plaintiff *as such executor*, sufficiently shows that the plaintiff sues in his representative character. *Scranton v. Farmers' and Mechanics' Bank*, 33 *Barb.* 527.

17. Rights and Liabilities.—The executor has constructive possession of decedent's goods from the time of his death. (1 *Term. (Ill.)* 480.) An executor may declare on his own possession, "as executor," though in fact he never has had possession. (2 *Saund.* 47; 10 *East*, 293; 2 *Taunt.* 116.) Under the laws of California, an administrator is vested with the right to the possession of the real estate of his intestate, as well as the personal property; and his duties and liabilities in respect thereto are, therefore, of the same general character. *Walls v. Walker*, *Cal. Sup. Ct., Apr. T.*, 1689.

18. Use and Occupation.—If the administrator occupies and uses premises belonging to an estate, he becomes at least the tenant of the estate, liable in any event for the value of its use and occupation; and if he makes a profit he becomes liable for that also at the election of the parties in interest; such is the law of his relation. If in this case the administrator sustained a loss, the loss is his; and the hardship is no greater than a like result in the case of any other tenant. *Walls v. Walker*, *Cal. Sup. Ct., Apr. T.*, 1869.

*No. 56.*ii. *By an Administrator.*

[TITLE.]

The plaintiff complains, and alleges:

I. [*State a cause of action accruing to the intestate.*]

II. That on the day of, 187., at, the said A. B. died intestate.

III. That on the day of, 187., letters of administration upon the estate of the said A. B. were issued by the Probate Court of the County of, in this State, to the plaintiff.

IV. That the plaintiff thereupon duly qualified as such administrator, and entered upon the discharge of the duties of his said office.

[*Demand of Judgment.*]

19. Administrators, Special and General.—By our statute there are only two classes of administrators, special and general; and no such officer as an “administrator *de bonis non*” is known to our law. When the authority of a general administrator is terminated, and a new one appointed, the latter takes the place of the first, and succeeds to the office, clothed with the same powers, and subject to the same restrictions; and when he invokes the action of the Court, he must institute the same proceedings, and, so far as he is able, must make a similiar showing. (*Haynes v. Meeks*, 20 *Cal.* 288.) Administrators in law are deemed but as one person, and the act of any one of two or more co-administrators, in a matter within the sphere of his authority as administrator, is the act of all. *Willis v. Farley*, 24 *Cal.* 490.

20. Allegations Essential.—The *date*, *place*, and *power of appointment* must be averred, issuably. (*King v. Roxborough*, 2 *Cr. & J.* 418; *Neil v. Cherry*, 1 *West. Law M.* 155; *Sheldon v. Hoy*, 11 *How.*

Pr. 12; *Beach v. King*, 17 *Wend.* 197; *Gillett v. Fairchild*, 4 *Denio*, 80; *White v. Joy*, 3 *Kern.* 80; *Chantanque Co. Bk. v. White*, 2 *Seld.* 236; *Forrest v. Mayor of N.Y.*, 13 *Abb. Pr.* 350.) If this is not done, the complaint is bad on demurrer on that ground. (*Sheldon v. Hoy*, 11 *How. Pr.* 11.) But otherwise, if the cause of action is one on which he may sue in his own right. (*Bright v. Currie*, 5 *Sandf.* 433; S.C., 10 *N.Y. Leg. Obs.* 104.) For a form of averment alleging appointment, see (*Beach v. King*, 17 *Wend.* 197; *Gillett v. Fairchild*, 4 *Den.* 80.) Section 161, N.Y. Probate Code, and § 52, Cal. Probate Act, are applicable to the decision of the Surrogate (Probate Court), in the appointment of an administrator. *Anderson v. Potter*, 5 *Cal.* 63; *Wheeler v. Dakin*, 12 *How. Pr.* 537.

21. Appointment after Resignation, in an action brought by an administrator, who has been appointed after the resignation of a former administrator, is sufficient, if it avers the issue of letters to the former administrator, that he qualified and entered upon the discharge of the trust, that he resigned, and his resignation was accepted by the Probate Court, and that the plaintiff was afterwards appointed administrator, and qualified, and that letters were issued to him. *Lucas v. Todd*, 28 *Cal.* 182.

22. Capacity to Sue.—The capacity of the plaintiff to sue is independent of the cause of action. *Bk. of Lowville v. Edwards*, 11 *How. Pr.* 216; *Johnson v. Kemp*, 11 *Id.* 186; *Bk. of Havana v. Wickham*, 16 *Id.* 97; *Murray v. Hendrickson*, 6 *Abb. Pr.* 96; 1 *Bosw.* 635; *Thomas v. Desmond*, 12 *How. Pr.* 321.

23. Cause of Action.—A petition stating the character in which the plaintiff sued, the indebtedness to the intestate, and the prayer for judgment as administratrix, is a sufficient statement of a cause of action and right to sue. *Duncan v. Duncan*, 19 *Mo.* 368.

24. Form of Complaint.—For a complaint by an administrator, with the will annexed of a deceased judgment-creditor who was resident of a foreign state, see *Wheeler v. Dakin*, 12 *How. Pr.* 537.

25. Indebtedness.—A complaint by an administrator must state an indebtedness to the intestate, and must refer to the plaintiff in his representative capacity. *Christopher v. Stockholm*, 5 *Wend.* 36.

26. Insufficient Averment.—A complaint commencing "A. B., Administrator of the goods, etc., of deceased, plaintiff in

this action," and containing no other statement of the fact of the plaintiff's appointment as administrator, does not allege that he is administrator, or show that he prosecutes in that capacity. *Merritt v. Seaman*, 6 *N.Y.* 168; *Sheldon v. Hoy*, 11 *How. Pr.* 11; *Christopher v. Stockholm*, 5 *Wend.* 36; *Worden v. Worthington*, 2 *Barb.* 368.

27. Issuance, Averment of.—An averment that letters testamentary on, etc., and not before, were issued to, etc., is sufficient to import that no other or prior letters had been issued. *Benjamin v. De Grott*, 1 *Den.* 151.

28. Maine.—The plaintiff may maintain a suit in the Circuit Court, as a citizen of Maine, in his character of administrator, if he has taken out letters in New Hampshire. 4 *Cranch*, 306; *Carter v. Treadwell*, 3 *Story C. Ct.* 25.

29. Minority of Executor.—Where suit is brought by an administrator during the minority of the executor, his powers are determined when the executor attains *full* age, and the fact that he has not attained full age must be averred in the complaint. *Yeaton v. Lynn*, 5 *Pet.* 223.

30. Missouri.—An administrator may sue under the act to simplify proceedings at law. (*Mo. Rev. Stat.* 1825, p. 620; *Bailey v. Ormsby*, 3 *Mo.* 580.) But to do so he must set out his right to sue as administrator. *McGill v. Le Duc*, 3 *Mo.* 398.

31. New Promise.—An administrator or executor cannot by a new promise revive a claim once barred, even under the general Statute of Limitations. *Drouillard v. Wilson*, 10 *West. Law J.* 385; *Hill v. Henry*, 17 *Ohio R.* 9; *Exr. of Niemcewicz v. Bartlet Adm'r*, 13 *Ohio Rep.* 271; *Brown v. Anderson*, 13 *Mass.* 201; *Dawes v. Shed*, 15 *Id.* 6; *Ex parte Allen*, 15 *Id.* 58; *Thompson v. Brown*, 16 *Id.* 172; *Heath v. Watts*, 5 *Pick.* 140.

32. Proceedings on Appointment.—The order for the appointment, the qualifications of the appointee, and the issuing of letters to him thereon, are all necessary proceedings to invest such appointee with the office of an administrator. The appointment is *in fieri* until appointee has qualified and received his letters. *Estate of Hamilton*, 34 *Cal.* 464.

33. Public Administration.—In a suit by the public adminis-

trator, the declaration must aver distinctly the decedent's intestacy; and the allegation is equally proper in other cases. *Ketchum v. Morrell*, 2 *N.Y. Leg. Obs.* 58.

34. Washington Territory.—In Washington Territory, the complaint must show jurisdiction and a good cause of action. *Tolmie v. Dean*, *Wash. T.* 60.

No. 57.

iii. *Commencement of Complaint by Executor or Administrator Suing in his own Right.*

[TITLE.]

The plaintiff complains, as administrator of the estate [or executor of the will] of A. B. deceased, and alleges:

I. [*State cause of action.*]

[*Demand of Judgment.*]

35. In his own Name.—One in the possession of personal property as administrator, can bring an action in his own name against a wrong doer, for its wrongful conversion, without setting forth in the complaint his official and representative capacity. An allegation in the complaint, that the plaintiff sues as administrator, is surplusage. *Munch v. Williamson*, 24 *Cal.* 167.

No. 58.

iv. *Against an Administrator.*

[STATE AND COUNTY.]

[COURT.]

A. B., Plaintiff, <i>against</i> C. D., Administrator of the estate of E. F., deceased, Defendant.	}
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The plaintiff complains, and alleges:

I. [*State a cause of action against the intestate.*]

II. That the said E. F. has died intestate.

III. That on the day of, at, an order of the Probate Court of the County of, State of California, was made, appointing the defendant administrator of the said estate, and that he is now such administrator.

IV. That on the day of, 187., at, the claim hereinbefore set forth, verified by the oath of the claimant, and upon which this action is founded, was duly presented in writing by the plaintiff to the defendant, as such administrator, for allowance. And that the same was by him, as such executor, rejected.

[*Demand of Judgment.*]

36. Administrator with Will Annexed.—If the testator appoints an executor of his will, and the executor dies, and an administrator with the will annexed is appointed, the administrator with the will annexed, under the statutes of California, possesses all the powers conferred on the executor named in the will, and can sell the land devised if the executor could have sold it. *Kidwell v. Brummagin*, 32 *Cal.* 436.

37. Capacity.—A complaint against executors seeking to charge them in their representative capacity, cannot be sustained on demurrer, if the facts alleged show only a personal liability on their part. *Bartlett v. Hatch*, 17 *Abb. Pr.* 461.

38. Claims.—The words “claimant” and “claim” are synonymous with the words “creditor” and “demand.” (*Gray v. Palmer*, 9 *Cal.* 616.) And the term “claims,” as used in the act to regulate the estates of deceased persons in California, is broad enough to include a mortgage. *Ellis v. Polhemus*, 27 *Cal.* 350; commenting on and questioning a contrary decision in *Fallon v. Butler*, 21 *Cal.* 24.

39. Claims, Presentment of.—In an action upon a claim against an estate, presentation to and rejection by the administrator must be alleged. (*Ellison v. Halleck*, 6 *Cal.* 393; *Falkner v. Folsom*,

Id. 412; *Hentsch v. Porter*, 10 *Id.* 558.) The above cases overruled in (*Fallon v. Butler*, 21 *Cal.* 24); and the latter decision doubted in (*Ellis v. Polhemus*, 27 *Cal.* 354; see discussion in 6 *Cal.* 412; 7 *Id.* 124; 9 *Id.* 501; 10 *Id.* 30; and 24 *Id.* 498.) The date of presentment is essential to show that it was presented within three months before the action thereon. *Gen. Laws of Cal.* ¶ 5,832; *Benedict v. Hoggins*, 2 *Cal.* 386.

40. Claims, how Presented.—A claim against a deceased person, due to his executor or administrator, must be presented, duly authenticated, with affidavits, to the Probate Judge for allowance, within ten months, or it will be barred. (*Estate of Jas. A. Taylor*, deceased, 16 *Cal.* 434.) But this rule applies only to such claims as are debts against the estate, and not to expenses incurred in the administration; (*Deck v. Gherke*, 6 *Cal.* 666;) the object being to prevent estates from being squandered (*Id.*), or wasted in unnecessary litigation. (*Ellison v. Halleck*, 6 *Cal.* 386; *Falkner v. Folsom's Exrs.*, 6 *Id.* 412.) Other claims must be presented to the executor or administrator, and be approved by the Probate Judge. *Pico v. De la Guerra*, 18 *Cal.* 422.

41. Claims, when Presented.—Claims may be so presented before publication of notice to creditors. (*Ricketson v. Richardson*, 19 *Cal.* 330.) And if the creditor be absent, and had no actual notice of the publication, the claim may be presented at any time before distribution is entered. *Cullerton v. Mead*, 22 *Cal.* 95.

42. Claims, Allowance of.—The allowance of a claim by one executor is binding upon all. (*Willis v. Farley*, 24 *Cal.* 490.) The allowance of a claim by an administrator and the Probate Judge has the force and effect of judgments. (*Beckett v. Selover*, 7 *Cal.* 215; *Estate of Martin E. Cook*, 14 *Id.* 129; *Deck's Estate v. Gherke*, 6 *Id.* 666; *Falkner v. Folsom's Ex'rs*, 6 *Cal.* 412; *Estate of Hidden*, 23 *Cal.* 362; *McKinney v. Davis*, 6 *Mo.* 501; *Kennerly v. Shepley*, 15 *Mo.* 640.) But in no other sense than a judicial determination of the estate's indebtedness in the specified sum. (*Magraw v. McGlynn*, 26 *Cal.* 420.) And fixes the obligation of the estate. *Pico v. De la Guerra*, 18 *Cal.* 422.

43. Claims, Rejection of.—Where the executor neglected to indorse on the claim his allowance or rejection for more than ten days, it was held that it became a rejected claim on the expiration of the

ten days. (*Rice v. Inskip*, 34 *Cal.* 225.) The claimant of a rejected claim in recovering judgment thereon is entitled to interest from the time of presentment. *Pico v. Stearns*, 18 *Cal.* 376.

44. Contingent Claims.—The presentation and allowance of a contingent claim does not give it validity. (*Pico v. De la Guerra*, 18 *Cal.* 422.) Mortgage liens of record form no exception to the rule of claim. (*Ellison v. Halleck*, 6 *Cal.* 386.) The claim of a surviving partner for advances to the partnership should not be presented till the partnership affairs are wound up. (*Gleason v. White*, 34 *Cal.* 258.) But a claimant of specific property need not present a claim. *Gunter v. Janes*, 9 *Cal.* 643.

45. Description of Party.—If the defendant is described in the caption of the complaint as administrator, it is immaterial, so long as the facts stated in the body of the complaint show he is not sought to be charged as administrator. *People v. Houghtaling*, 7 *Cal.* 350.

46. Forms of Complaint.—As to sufficiency of declaration on promise by administrator which did not aver assets, see (*Adams v. Whiting*, 2 *Cranch, C. Ct.* 132.) Sufficiency of complaint against executrix, in her own wrong, which did not charge her as such, (*Harper v. West*, 1 *Cranch, C. Ct.* 192.) Or of one which did not show by whom the letters are granted, *Cawood v. Nichols*, 1 *Cranch, C. Ct.* 180.

47. Legacy.—In an action against executors for a legacy, plaintiff must aver and prove existing assets. (*Dewitt v. Schoonmaker*, 2 *Johns.* 243.) A legatee who has been represented by counsel at the allowance of accounts against the estate, will not be allowed, after a lapse of time, to come in and have the allowance set aside on a mere general averment of newly discovered evidence. (*Williams v. Price*, 11 *Cal.* 212.) In such a case it is not sufficient to allege ignorance at the time of allowance, but the plaintiff must go further and show that he could not, with the use of due diligence on his part, have made himself acquainted with, or ascertained the existence of the facts. *Id.*

48. Letters Testamentary.—If letters testamentary have not been issued, the defendant is not an executor. *Thomas v. Cameron*, 16 *Wend.* 579.

49. Louisiana.—In Louisiana, an action brought by a creditor of a testator against his executor, charging him with a *devastavit*, without averring proceedings to compel the defendant to exhibit a table of distribution, cannot be maintained. *McGill v. Armour*, 11 *How. U.S.* 142.

50. Non-Presentment.—But the non-presentation of a claim against the estate of a deceased person defeats only the present right to recover. (*Hentsch v. Porter*, 10 *Cal.* 560.) After failure in the District Court on account of non-presentation, the claim may be presented, if within the statutory time; and if rejected, a new suit instituted which will not be barred by the former judgment. *Id.*

51. Possession of Estate.—In an action against an administrator, where the complaint alleges that he has taken possession of the real estate of the decedent, it will be presumed that it was legal possession. *Butt v. Clark*, 23 *Ind.* 548; see Note 18.

52. Presentment, Effect of.—The presentment of a claim to the administrator is the commencement of a suit upon it, and stops the running of the statute. (*Beckett v. Selover*, 7 *Cal.* 215.) They must be presented within the time allowed, or they will not constitute a charge against the estate. (*Pico v. De la Guerra*, 18 *Cal.* 422.) And the statute fixes the limit at ten months, and this time does not commence running until a claim becomes absolute. *Gleason v. White*, 34 *Cal.* 258; *Matter of Estate of Taylor*, 10 *Cal.* 482.

53. Promise.—In an action against executors, plaintiff may, to save the Statute of Limitations, lay the promise as made by the representative. (*Whitaker v. Whitaker*, 6 *Johns.* 112; *Carter v. Phelps*, 8 *Id.* 440.) A complaint which alleges a promise by deceased, and also a promise by his administrators, though informal, is not bad on general demurrer, if it appears that defendants are charged in their representative capacity. (*Curtis v. Bowrie*, 2 *McLean*, 374.) Where the complaint did not state that the promises were made in the testator's lifetime, nor to him, nor for an indebtedness to him, nor to them as administrators, the action is in their individual and not in their representative capacity. (*Worden v. Worthington*, 2 *Barb.* 368; see *Merritt v. Seaman*, 6 *N.Y.* 168.) A complaint which shows only a personal liability cannot be sustained on demurrer. *Bartlett v. Hatch*, 17 *Abb. Pr.* 461.

54. Torts, Actions of.—No action can be sustained against an

executor or administrator, as such, on a penal statute; nor when the cause of action is founded upon any malfeasance, or misfeasance is a tort, or arises *ex delicto*, such as trespass, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, etc., when the complaint imputes a tort done to person or goods of another by the testator or intestate. 2 *Williams on Executors*, pp. 1,470-1,471; *Wheatley v. Lane*, 1 *Sand.* 216, n. 1; *People v. Gibbs*, 9 *Wend.* 29; *Eustace v. Jahns*, *Cal. Sup. Ct., Jul. T.*, 1869.

CHAPTER V.

HUSBAND AND WIFE.

No. 59.

- i. *Against Husband, for Necessaries Furnished to Defendant's Family, without his Express Request, at a Reasonable Price.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, he furnished to Mary Smith, the wife of defendant, at her request, sundry articles of [food and clothing].

II. That the same were necessary for her.

III. That the same were reasonably worth dollars.

IV. That defendant has not paid the same.

[*Demand of Judgment.*]

1. Husband, when Liable.—If a husband fails or refuses to provide a support for his wife, the law authorizes her to purchase from others on the credit of her husband, whatever is necessary for her maintenance, and suitable to her station in life. * (Galland v. Galland, *Cal. Sup. Ct., Jul. T.*, 1869.) It is unnecessary to allege that the wife acted as the husband's agent, or with his consent. In nine cases out of ten these averments would be fictions of law, which must never be

pleaded under the Code. The husband is liable in the proper cases, although he had expressly forbidden the plaintiff to trust his wife. 2 *Kenl's Com.* 148; *Sykes v. Halstead*, 1 *Sand.* 483.

2. Husband, when not Liable.—A wife who without cause and against her husband's will refuses to live with him, cannot bind him for necessities to a third party, who knows that she is not living with her husband, and who sells to her without further inquiry. *Brown v. Mudgett*, 40 *Vt.* 68.

No. 60.

ii. *Against Husband and Wife for Goods Sold, for her Separate Estate.*

[TITLE.]

The plaintiff complains, and alleges:

I. That between the day of, 187., and the day of, 187., at, the plaintiff sold and delivered to the defendant A. B., who was then, and still is, the wife of the defendant C. B., materials used for the building of a house for her, upon and for the benefit of her separate lands and premises, situated in the town of, in the County of, bounded and described as follows: [*Describe the premises.*]

II. That the said defendant, A. B., in consideration thereof, then and there promised the plaintiff that she would pay for the same dollars, out of her separate property, and did agree and intend that the same should be paid for out of her separate property.

III. That such materials are reasonably worth the said sum of dollars, and that no part thereof has been paid. .

IV. The plaintiff further alleges, on information and belief, that the premises above mentioned and described,

were, at and before the day of, 187., [date of marriage], since have been, and now are, her sole and separate property; and the same are worth about dollars.

Wherefore the plaintiff demands judgment.

1. That the separate property aforesaid be charged with the payment of the said sum of dollars, with interest from, together with the costs of this action.

2. That the said property be applied to the payment of the same.

3. That a trustee be appointed to take possession of her said separate property, and dispose of it, or of so much thereof as shall be necessary to satisfy the same.

3. Charging Separate Estate.—A complaint under the New York practice, which directly alleges that the note was given by her for the express purpose of charging her separate estate with its payment, is sufficient on demurrer. (18 *N.Y.* 265; *Frances v. Ross*, 17 *How. Pr.* 561; *Phillips v. Hagadon*, 12 *How. Pr.* 17.) So, it seems a complaint seeking to charge the separate estate of the wife, is bad, if it does not set forth the property and the nature of her interest. 8 *Madd.* 387; 1 *Id.* 258; 7 *Paige*, 9; 17 *Ves.* 365; 3 *Barb. Ch.* 9; 20 *Wend.* 570; 1 *White's Lead. Eq. Cas.* 65; *Law Lib.* 394; *Macq. Hus. and Wif.* 294; 1 *Dan. Ch. Pr.* 205; 1 *Myl. & Cr.* 105; *Sexton v. Fleet*, 6 *Abb. Pr.* 8.

4. Common and Separate Property equally Liable.—The separate property of the wife, and the common property of both husband and wife, are equally liable for the debts of the wife contracted before marriage. (*Van Maren v. Johnson*, 15 *Cal.* 313.) The statute changes the common law rule on this subject. (*Id.*) In an action against the husband and wife, on a sole debt of the wife contracted by her before marriage, a judgment may be rendered to be collected out of the common property of both husband and wife. *Vlantin v. Bumpus*, 35 *Cal.* 214.

5. Consideration.—If the debt is contracted for the benefit of the wife, or of her estate, no allegation of an intent to charge it on the estate is necessary. (See *Yale v. Dederer*, 18 *N.Y.* 173, 284, 285.) In New York, if the consideration were not for the benefit of the wife or her estate, this allegation is necessary. (*Yale v. Dederer*, 18 *N.Y.* 281.) The agreement must be in writing; (*S.C.*, 22 *N.Y.* 450;) but this need not be alleged in the complaint.

6. Coverture.—The fact of coverture has ceased to have any relation to the technical right of maintaining an action by a married woman in respect to her separate property, and the allegation of coverture in the complaint is not necessary. (*Peters v. Fowler*, 41 *Barb.* 467.) A *femme covert* has no power to make a contract. This rule has its exceptions, but the signing of a note and execution of a mortgage to secure its payment is not one of the exceptions. (*Simpers v. Sloan*, 5 *Cal.* 458.) So, a married woman cannot alone execute a deed of the homestead. *Poole v. Gerrard*, 6 *Cal.* 73.

7. Demand of Judgment.—To charge the separate estate of a wife in an equitable action in New York, the demand must be as in this form. *Cobine v. St. John*, 12 *How. Pr.* 333; *Coon v. Brook*, 21 *Barb.* 546; *Yale v. Dederer*, *Id.* 286; *Chapman v. Lemon*, 11 *How. Pr.* 235.

8. Estate must be Shown.—The complaint must show what the estate is, and what is its value. (*Sexton v. Fleet*, 6 *Abb. Pr.* 9; *S.C.*, 15 *How. Pr.* 106; *Cobine v. St. John*, 12 *How. Pr.* 336.) But such is not the practice in California; for in this State the complaint need not set out any separate property of the defendant, because the wife was liable *in personam* before coverture, and under our statute continues so after marriage. *Bostic v. Love*, 16 *Cal.* 69. See, also, *Foote v. Morris*, 12 *N.Y. Leg. Obs.* 61.

9. For Benefit of her Separate Lands.—From form in (*Dickerman v. Abrahams*, 21 *Barb.* 551.) The weight of the decisions is, that the acts relative to the rights and liabilities of married women in New York, enlarged only the power of married women to hold and convey their separate estate, but did not operate to subject them to new remedies on their personal contracts. (*Francis v. Ross*, 17 *How. Pr.* 561; *Gates v. Brower*, 9 *N.Y.* (5 *Seld.*) 205; *Switzer v. Valentine*, 4 *Duer*, 96; *Cobine v. St. John*, 12 *How. Pr.* 333; *Coon v. Brook*, 21

Barb. 546; *Dickerman v. Abrahams*, *Id.* 551; *Yale v. Dederer*, *Id.* 286; *Lovett v. Robinson*, 7 *How. Pr.* 105; *Phillips v. Hagadon*, 12 *Id.* 17; *Wotkyns v. Abrahams*, 14 *Id.* 191; compare *Walker v. Swansee*, 3 *Abb. Pr.* 136.) For other modes of pleading, see *Coster v. Isaacs*, 16 *Abbotts' Pr.* 328; *Baldwin v. Kimmel*, *Id.* 353; *Young v. Gori*, 13 *Id.* 13, *note*; *Thompson v. Sargent*, 15 *Id.* 452; *Aitken v. Clark*, 16 *Id.* 328, *note*.

10. Form of Judgment.—There is no difference in the form of judgment though the *execution* is restricted. (*Laws of N.Y.* 1853, p. 1,057.) For form of complaint on a note endorsed by the wife, while sole, before the delivery of the note to the payee, see *Sexton v. Fleet*, 6 *Abb. Pr.* 8; *S.C.* 15 *How. Pr.* 106.

11. Homestead.—A complaint by husband and wife to recover the homestead conveyed away by the deed of the husband alone, must aver either that the premises were occupied as a homestead at the date of the conveyance, or that they had not been previously abandoned. *Harper v. Forbes*, 15 *Cal.* 202.

12. Marriage.—A marriage *de facto*, although not legally solemnized, is sufficient at common law to render the husband liable for the previously contracted debts of the wife. (*Andr.* 227–8; 1 *Camp.* 245; 2 *Esp.* 637.) It is not material whether the marriage was solemnized, if the parties afterwards, and after the passage of the act, resided and acquired the property here. *Dye v. Dye*, 11 *Cal.* 163.

13. Misjoinder of Causes of Action.—Claim for personal judgment against husband, and enforcement of a lien against wife's separate estate, are incompatible. *Palen v. Lent*, 5 *Bosw.* 713; *Sexton v. Fleet*, 2 *Hill.* 477; 15 *How. Pr.* 106; 6 *Abb. Pr.* 8.

14. Promise of Married Woman.—In New York, in an action to charge the separate estate of a married woman upon her promise, it is necessary that the complaint allege either that the consideration of the promise was for the benefit of the estate, or that she intended to charge such estate. *Palen v. Lent*, 5 *Bosw.* 713; *Francis v. Ross*, 17 *How. Pr.* 561.

15. Property Liable for Debts of Wife.—The separate property of the wife is liable for her debts contracted before marriage, and the separate property of the husband is not. (*Gen. Laws. of Cal.*, ¶ 3,575; *Van Maren v. Johnson*, 15 *Cal.* 311; *Vanderheyden v. Mal-*

lory, 1 *Const.* 472.) The interest of the wife in the common property is a mere expectancy, like the interest which an heir may possess in the property of his ancestor. *Van Maren v. Johnson*, 15 *Cal.* 311; *Guice v. Lawrence*, 2 *La. An.* 226.

16. Property Owned before Marriage.—The complaint is not demurrable for omitting to designate the wife's separate property, which by the Statute Law of N.Y., 1853, is alone bound by the judgment in such case. *Foote v. Morris*, 12 *N.Y. Leg. Obs.* 61.

17. Rent.—Where husband and wife are sued for rent claimed on a lease made by plaintiff to the wife, plaintiff and the wife being tenants in common of the property: *Held*, that the wife can be liable only as sole trader under the statute; and that the complaint must aver facts requisite to establish her liability in that character, and that the allegation that she "was doing business as a *femme sole*, with the consent of her husband," is insufficient. *Aiken v. Davis*, 17 *Cal.* 119.

18. Sale and Delivery.—The complaint must allege a sale for the benefit of such estate. (*Bass v. Bean*, 16 *How. Pr.* 92.) Alleging a sale and delivery to the husband, instead of alleging a sale and delivery to the wife on the faith of or for the benefit of her separate estate, is not sufficient. (*Arnold v. Ringold*, 16 *How. Pr.* 158.) Merely alleging a sale on the credit of her estate, is insufficient on demurrer. *Bass v. Bean*, 16 *How. Pr.* 93.

19. Separate Property.—In an action against husband and wife to recover ante-nuptial debts, the complaint need not designate wife's separate property. (*Foote v. Morris*, 12 *N.Y. Leg. Obs.* 61.) Where the complaint does not aver that the purchase money paid for land, brought in the name of the wife, was her separate property, the presumption is that it is common property. *Althorf v. Conheim*, *Cal. Sup. Ct., Jul. T.*, 1869.

20. Sufficient Averment.—Where the complaint in an action upon the contract of a married woman alleged that the property sold was for the use and benefit of the wife, that it was purchased at her special instance and request, and used in and about her premises, it is a sufficient averment of a contract made with the wife in relation to her separate property. *Musser v. Hobart*, 14 *Iowa*, 248.

No. 61.

iii. *By a Married Woman.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, the plaintiff intermarried with one A. B., whose wife she now is.

II. That on the day of, 187., at, the defendant made his promissory note payable to the plaintiff for the sum of dollars, and which note is in words and figures as follows: [*Copy note.*]

III. That the consideration of the said note was the payment by this plaintiff to the maker thereof of the sum of dollars, which said sum was at and before the time of her marriage owned by her, and thereafter was her sole and separate property, and so continued until the date the said note became due, and that said note thereupon became and ever since has remained her sole and separate property [*or otherwise, according to the circumstances, showing it to be her separate estate*].

[*Demand of Judgment.*]

21. Division of Common Property.—In an action for the division of the common property of husband and wife after a decree of divorce, the plaintiff, to bring herself within the provisions of the Act "Defining the Rights of Husband and Wife," passed April 17th, 1850, must affirmatively state such facts as give her the right to the property under the Act. *Dye v. Dye*, 11 Cal. 163; see *Johnson v. Johnson*, 11 Id. 200.

22. Marriage, Averment of.—Where the plaintiff averred in her complaint, in a suit brought for her distributive share of the estate of an alleged deceased husband, that the deceased made proposals of marriage to her, when she accepted, and consented to live with him as his true and lawful wife; and that in accordance with his wishes, she henceforth lived and cohabited with him as his wife, always conducting herself as a true, faithful and affectionate wife should do: *Held*, that these were insufficient averments of the existence of a marriage, and that the facts averred were only *prima facie* evidence of a marriage. *Letters v. Cady*, 10 *Cal.* 533; see *People v. Anderson*, 26 *Id.* 129.

23. Mortgage.—It is immaterial whether a conveyance to the wife was made with or without a fraudulent intent; in either case it is unavailing against the mortgage, because the inference from the language of the complaint that the conveyance was upon purchase and during marriage, and consequently, that the property was common property, is not negatived by any averment that the property was transferred to her before marriage, or was a gift to her, or in exchange for her separate property. *Kohner v. Ashenauer*, 17 *Cal.* 578.

24. Mortgage of Separate Property.—Where a wife sought relief by a bill in chancery from a mortgage of her separate property, it was no objection to the bill, as a rule of pleading, that the husband was made a party to it with the wife. He acts only as her *prochain ami*. *Bein v. Heath*, 6 *How. U. S.* 228.

25. Separate Property of Wife.—The law of California provides that all property owned by the wife before her marriage, or after marriage, acquired by gift, bequest, devise, or descent, shall be her separate estate. (*Gen. Laws of Cal.*, ¶ 3,563; *Alverson v. Jones*, 10 *Cal.* 11; *Meyer v. Kinzer*, 12 *Cal.* 251; *Smith v. Smith*, 12 *Cal.* 224.) The law in this respect being similar to that of Texas and Louisiana. (*Lott v. Leach*, 5 *Tex.* 394; *Houston v. Civil*, 8 *Tex.* 242; *Gillard v. Chesney*, 13 *Tex.* 337; *Chapman v. Allen*, 15 *Tex.* 278; *Claiborne v. Tanner*, 18 *Tex.* 69; *Ford v. Ford*, 1 *La.* 207; *Dominguez v. Lee*, 17 *La.* 290; *Smalley v. Lawrence*, 9 *Rob.* 214; *Fisher v. Gordy*, 2 *La. Ann.* 763; *Webb v. Peck*, 7 *Ann.* 92; see, also, *Hart v. Robertson*, 21 *Cal.* 346; *Adam v. Knowlton*, 22 *Cal.* 283.) A general averment that the property is the separate property of the married woman, is not bad on demurrer. *Spies v. Accessory Transit Co.*, 5 *Duer*, 662; *Lipman v. Petersburg*, 10 *Abb. Pr.* 254.

26. Separate Property, Sale of.—When any sale shall be made, by the wife of any of her separate property, for the benefit of her husband, or when he shall have used the proceeds of such sale with her consent in writing, it shall be deemed a gift, and neither she nor those claiming under her shall have any right to recover the same. *Gen. Laws of Cal.*, ¶ 3,569.

27. Services of Wife before Marriage.—The husband is properly joined with the wife in an action for service performed by her, and the action brought therefor, previous to marriage. *Van Maren v. Johnson*, 15 *Cal.* 310.

28. When Husband may Join.—When a married woman is a party, her husband must be joined with her, except in special cases. (*Cal. Pr. Act*, § 7.) And even in these special cases, it is not obligatory on the wife to sue alone. *Van Maren v. Johnson*, 15 *Cal.* 311.

29. When She may Sue Alone.—In actions concerning her separate estate, she may sue alone, as if she were a *femme sole*. (*Cal. Pr. Act*, § 7; *N.F. Code*, § 114; *Snyder v. Webb*, 3 *Cal.* 83; *Van Maren v. Johnson*, 15 *Id.* 310; *Aiken v. Davis*, 17 *Cal.* 129; *Coster v. Isaacs*, 16 *Abb. Pr.* 328; *Baldwin v. Kimmell*, *Id.* 353.) So in Illinois, under the Act of 1861, p. 24. (See 32 *Ill.* 493.) So, also, in New York, under the Code of Procedure, § 114. So, also, by the laws of Pennsylvania. (See 13 *Penn.* 480; 11 *Penn.* 275; 16 *Penn.* 134; 5 *J. J. Marsh*, 230.) So, also, under the laws of Texas. (2 *Tex.* 378; 9 *Tex.* 297; 13 *Tex.* 337; 12 *Tex.* 278.) A married woman may sue alone in actions against her husband. (*Kashaw v. Kashaw*, 3 *Cal.* 312.) So under the laws of Illinois, 1861, p. 243. See 32 *Ill.* 493.

30. When She cannot Sue Alone.—The wife cannot bring suit in her own name on a contract which the law does not authorize her to make. (*Snyder v. Webb*, 3 *Cal.* 83.) Nor to recover the homestead. (*Poole v. Gerrard*, 6 *Cal.* 71; *Guiod v. Guiod*, 14 *Id.* 506.) Nor for damages for a personal injury. (*Sheldon v. "Uncle Sam,"* 18 *Cal.* 526.) The question of the rights of married women is regulated by the statutes of the several states. Hence the authorities referred to have little application, except in the states where such laws are in force, or the decisions were made. In Illinois, whenever a wife joins with her husband, her interest must appear. 2 *Bla.* 1,236.

*No. 62.**iv. Against a Married Woman.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is the wife of one A. B.

II. That at the time of making the note hereinafter mentioned, the defendant was, and still is, seized in fee [*or otherwise*], in her own separate right, of a farm in the County of containing acres of land, of the value of dollars.

III. That on the day of, 187., at, in consideration of the said note, the plaintiff sold and delivered to the defendant [thirty sheep], of the value of dollars, which were used to stock her said farm.

IV. That in consideration thereof, the defendant agreed to charge her said estate with the amount of the said note.

V. [*Allege making of the note in the usual manner.*]

Wherefore the plaintiff demands judgment:

1. That the said note be a charge upon the said estate of the defendant.

2. That the said estate be applied to the payment of the sum of dollars, with interest from the day of, 187..

3. That a receiver be appointed to take possession of the same, for that purpose.

31. Action.—Our statute does not provide for this class of actions.

No. 63.

v. *Against a Married Woman, as Sole Trader.*

[TITLE.]

The plaintiff complains, and alleges :

I. That the defendant is the wife of one A. B.

II. That on the day of, by a decree the of Court, of the Judicial District, County of, in this State, the defendant was decreed a sole trader ; and at the time of making the note hereafter mentioned, the defendant was, and still is, a sole trader, carrying on business as, at

III. That on the day of, 187., at, in consideration of the said note, the plaintiff sold and delivered to the defendant, of the value of dollars, which were used by the defendant in her said business, as sole trader.

IV. That in consideration thereof, the defendant, as sole trader, made her promissory note, of which the following is a copy: [*Copy note.*]

V. That she has not paid the same.

[*Demand of Judgment.*]

32. Separate Property.—The letters received by a married woman from her first and second husband, before her marriage with the latter, are her separate property,—like jewels, and her gift of them to her daughter is valid as against her husband. *Grigsby v. Breckinridge*, 2 *Bush*, 480.

33. Sole Trader.—A complaint, in an action to recover a debt from a married woman, which charges that she is a sole trader under

the statute, is sufficient, without any averment of facts showing that the debt was contracted in the particular business which she had declared her intention to carry on. *Melcher v. Kuhland*, 22 *Cal.* 522.

34. Sole Trader, Averment of.—An averment in the complaint that the defendant, a married woman who carried on a separate business, represented at the time of making the contract that it was for the uses of such business, is sufficient on demurrer. (*Coster v. Isaacs*, 16 *Abb. Pr.* 328.) If the contract was not in fact for the use of such business, it should appear by way of defense. (*Id.*) For the substance of a complaint against a married woman as sole trader, see *Goulding v. Davidson*, 26 *N.Y.* 604; and, less fully, 25 *How. Pr.* 483.

No. 64.

vi. *The Same, on Contract Generally.*

[TITLE.]

The plaintiff complains, and alleges :

I. [*State marriage as in previous form.*]

II. [*State cause of action.*]

III. That the property hereinbefore mentioned was acquired by her as sole trader, and has ever since been her sole property.

[*Demand of Judgment.*]

35. Facts to be Alleged.—By the decisions of the courts in New York, it seems that it is still necessary in an action against a married woman, to allege in the complaint the facts creating her peculiar liability, for an act relating to her separate estate, or relating to trade carried on by her for her own benefit. 21 *Barb.* 551; *Baldwin v. Kimmel*, 16 *Abb. Pr.* 353.

CHAPTER VI.

INFANTS.

N^o. 65.

i. *By an Infant.*

[STATE AND COUNTY.]

[COURT.]

A. B., an Infant, by C. D., his Guardian, Plaintiff, <i>against</i> E. F., Defendant.	}
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The plaintiff complains, and alleges:

I. That he is under the age of twenty-one years.

II. That on the day of, 187., at, the above named C. D. was duly appointed by the Court of the County, State of California, guardian of the property and person of the plaintiff.

III. [*State the cause of action.*]

[*Demand of Judgment.*]

1. Actions by or against Infants.—That an infant may appear by guardian, see *Cal. Pr. Act*, § 9; *N. Y. Code*, § 115.

2. Appointment of Guardian.—Where the will appoints a guardian, there is no necessity for any letters of guardianship. (*Norris v. Harris*, 15 *Cal.* 255.) The Court has no right to appoint a guardian.

ad litem till the infant is properly brought before the Court. (*Gray v. Palmer*, 9 *Cal.* 616.) But where his interests require it, the Court will appoint, even though the minor may have a general guardian. (*Gronfier v. Puymiro*, 19 *Cal.* 629.) The provisions of §§ 9 and 10 of the *Cal. Civil Pr. Act*, relative to the appointment of guardians *ad litem*, where infants are parties, only apply where there is no general guardian or where he does not act. *Id.*; approved in *Fox v. Minor*, 32 *Cal.* 119; *Spear v. Ward*, 20 *Id.* 676.

3. Appointment must be Alleged.—Where the plaintiff is an infant suing by guardian, the complaint shall contain an allegation of the appointment of the guardian, and it should be stated in a traversable form. (*Hulbert v. Young*, 13 *How. Pr.* 414; *Hill v. Thacter*, 3 *How. Pr.* 407; 2 *Code R.* 3; *Grantman v. Thrall*, 44 *Barb.* 173; see; also, 8 *Cow.* 235.) Where a complaint was entitled “J. G., by J. G. his Guardian, v. G. T.”; and commenced thus: “The plaintiff complaining states;” etc., but contained no allegation that the plaintiff was an infant, under the age of twenty-one years, or that the guardian was appointed by any court; *Held* bad on demurrer, for the reason that while it showed that the plaintiff appeared by guardian, it did not show that the guardian was duly appointed, so as to authorize such appearance. 8 *Cow.* 235; 13 *How. Pr.* 413; *Grantman v. Thrall*, 44 *Barb.* 173.

4. Appointment, how Alleged.—Appointment must be alleged with certainty as to time, place, and power of the appointment. 2 *Saund.* 117; 1 *Lev.* 224; 2 *Arch. Pr.* 940; *Stanley v. Chappel*, 8 *Cow.* 235; *Hulbert v. Young*, 13 *How. Pr.* 413; and see *Gillett v. Fairchild*, 4 *Den.* 83; *Beach v. King*, 17 *Wend.* 197; and *White v. Low*, 7 *Barb.* 204; as explained by *White v. Joy*, 13 *N.F.* 82.

5. Disaffirmance of Deed.—Where an infant conveys his land, and afterwards, on coming of age, would avoid the deed and recover possession, he must before suit make an entry upon the lands, and execute a second deed to a third person, or do some other act of equal notoriety in disaffirmance of the first deed, or an action cannot be maintained. (*Bool v. Mix*, 17 *Wend.* 119; *Dominick v. Michael*, 4 *Sandf.* 420.) His act of disaffirmance must be averred in the pleading, and is necessary to be proved. The want of this allegation makes the complaint fatally defective. *Voorhis v. Voorhis*, 24 *Barb.* 150.

6. Duly Appointed.—That the appointment was made in the plaintiff's application, is implied by the averment that the guardian was

"duly appointed." *Polly v. Saratog and Washington R.R. Co.*, 9 *Barb.* 449; *People ex rel. Haws v. Walker*, 2 *Abb. Pr.* 421; *People ex rel. Crane v. Ryder*, 12 *N.P.* 433.

7. Employment.—In an action by a guardian, to recover from his ward's estate for services rendered in a suit at law, it must be alleged that the employment of the plaintiff was a reasonable and proper expense incurred by the guardian. *Caldwell v. Young*, 21 *Tex.* 800.

8. General Averment.—If the allegation be deemed too general, the objection cannot be taken by demurrer. The remedy is by motion to make it more definite. *Séré v. Coit*, 5 *Abb. Pr.* 481.

9. General Guardian.—A general guardian cannot sue in his own name to recover money due the infant. Such actions must be brought in the name of the infant, by his guardian. (*Spear v. Ward*, 20 *Cal.* 676; *Fox v. Minor*, 32 *Cal.* 119.) In an action by an infant, a general guardian, designated in the complaint as a guardian *ad litem*, is of no importance, if the body of the complaint shows him to be a general guardian. *Spear v. Ward*, 20 *Cal.* 676.

10. Infant Femme Covert.—Under the California Statutes, the disability of infancy attaches as well to a *femme covert* under age, as to a *femme sole*, subject to the Act of 1858, p. 108, which makes married women under eighteen, and married with the consent of their parent or guardian, of full and lawful age. *Magee v. Welsh*, 18 *Cal.* 155.

11. Illinois.—In Illinois, minors may bring suits in all cases whatever, by persons they may select as their next friend, who must file a bond for costs that may accrue. *Scates, Treat. and Stat.* 552.

12. Ohio.—In Ohio, the action must be brought by the guardian or next friend of the infant (*Ohio Code*, § 30), who is liable for all costs. (*Id.* § 31.) In *Hulbert v. Newell*, 4 *Ohio Pr. R.* 93, it was held that in a joint suit by husband of age, and wife a minor, no guardian for the wife was necessary. *Cook v. Rawdon*, 6 *Pr. R.* 233.

13. Partition.—Guardians *ad litem* appointed to represent an infant in suits in partition, have no power to admit away by their answer the rights of the infants, as it is not a matter within the scope of their appointment. (*Waterman v. Lawrence*, 19 *Cal.* 210.) They have power to defend for the infant solely against the claim set up for partition of the common estate. *Id.*

14. Promissory Notes.—The promissory note of an infant is voidable, not void. *Young v. Bell*, 1 *Cranch C. Ct.* 342; *Tucker v. Moreland*, 10 *Pet. U.S.* 58.

15. Special Obligation of Ancestor.—Where the infant was sued upon a special obligation of the ancestor, chargeable upon the inheritance, he might pray that the proceedings be stayed until he should attain his majority. This privilege is confined to the heir alone. *Joyce v. McAvoy*, 31 *Cal.* 273.

16. Trover.—Infancy is no bar to an action of trover for conversion of goods. *Vasse v. Smith*, 6 *Cranch*, 226; *Fish v. Ferris*, 5 *Duer*, 49; *Conkling v. Thompson*, 29 *Barb.* 218.

17. Wages.—An infant, after the death of his father, cannot recover his wages for services performed in the lifetime of his father, under a contract made with the father. *Roby v. Lyndall*, 4 *Cranch C. Ct.* 351.

18. Wrongs.—Infancy is no defense to an action founded on fraud and falsehood of the party pleading it. *Catts v. Phalen*, 2 *How. Pr.* 376.

CHAPTER VII.

INSANE PERSONS.

No. 66.

i. *By Guardian of an Insane Person, or Person of Unsound Mind.*

[STATE AND COUNTY.]

[COURT.]

A. B., Guardian of C. D, an In- sane Person [<i>or</i> Person of un- sound mind], Plaintiff, <i>against</i> E. F., Defendant.	}
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The plaintiff complains, and alleges:

I. [*State the cause of action.*]

II. That on the day of, 187., at
....., the Court, of the County of,
State of California, adjudged the said A. B. to be an
insane person [*or* person of unsound mind].

III. That [at the same time and place ; *or*, on, etc.,
at, etc.], said Court appointed the plaintiff guardian of
the said A. B., with the [usual] powers.

[*Demand of Judgment.*]

1. Appointment of Guardian.—Upon petition under oath, by
any relative or friend of any insane person, or any person who by old
age or other cause is mentally incompetent, the Probate Judge shall,

after hearing and examination, appoint a guardian of his person and estate. (*Gen. Laws of Cal.*, ¶¶ 3,373 and 3,374.) And every such guardian shall appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose, as guardian or next friend. *Gen. Laws of Cal.* ¶ 3,377.

2. "Duly Appointed."—The word "duly," as used in the New York forms, may be omitted, as jurisdiction of the Probate Court will be presumed. (See *Bloom v. Burdick*, 1 *Hill*. 130.) As to presumption of jurisdiction, see "*Jurisdiction*," Chap. ii., p. 42, n. 102.

3. Limitations.—The probate of a will shall be conclusive, if not contested within one year, but in the case of infants, married women, and persons of unsound mind alike, a period of one year after their respective disabilities are removed is granted by the Probate Act. *Gen. Laws of Cal.*, ¶ 5,734.

4. Powers of Guardians.—As to powers of guardians to represent the interests of their wards in partition, see *Cal. Pr. Act*, §§ 306–307; *Thomas v. Hatch*, 3 *Sumn.* 170.

5. Letters of Guardianship.—Letters of guardianship of an insane person cannot be questioned in a collateral proceeding, and are admissible in evidence. *Warner v. Wilson*, 4 *Cal.* 310.

No. 67.

ii. *Against the Guardian of an Insane Person.*

[STATE AND COUNTY.]

[COURT.]

A. B., Plaintiff, <i>against</i> C. D., Guardian of E. F., an In- sane Person [<i>or</i> Person of un- sound mind], Defendant.	}	
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The plaintiff complains, and alleges:

I. [*State a cause of action against the insane person.*]

II. That afterwards [*or* on the day of, 187.], the said E. F. was adjudged by the Court to be a person of unsound mind.

III. That the defendant was appointed by the said Court guardian of the person and estate of the said E. F.

Wherefore the plaintiff demands judgment for dollars, with interest from, to be paid out of the estate of the said E. F., in the hands of the defendant.

6. Custody of Lunatics.—For a history of the judicial custody of lunatics, see *Brown's Case*, 1 *Abb. Pr.* 108; *S.C. 4 Duer*, 613.

7. Ejectment.—The guardian of a lunatic, etc., have no estate in his lands; and an action of ejectment for the lunatic's land must be brought in the lunatic's name. *Petrie v. Shoemaker*, 24 *Wend.* 85.

8. Equity Suits.—If any person has a legal or equitable claim against the estate of an insane person, which is under the care of the guardian, who refuses to allow the same, he must apply to chancery by petition. He will not be permitted to sue at law except under the sanction of chancery. 1 *Jac. and Walk.* 636; 5 *Mad.* 406; 2 *Sch. and Lef.* 229; 1 *Hog.* 98; *Matter of Heller*, 3 *Paige*, 199; *Brasher v. Van Cortlandt*, 2 *Johns. Ch.* 242; *Williams v. Est. of Cameron*, 26 *Barb.* 172.

9. Habitual Drunkard.—In New York, where, pending a suit brought by a creditor to reach the assets of his debtor, the latter is, by proceedings previously commenced in another court, adjudged to be an habitual drunkard, and a committee is appointed of his estate, the court in which the former suit is pending cannot properly proceed to final judgment. (3 *Paige*, 199; 4 *Den.* 262; 5 *Paige*, 489; 13 *Wend.* 29; 19 *Wend.* 649.) The rules of comity always observed toward each other by courts of concurrent jurisdiction, would prevent the granting of a decree as prayed for. *Niblo v. Harrison*, 9 *Bosw.* 668.

10. Lunatic.—A suit in equity for the benefit of a lunatic must be brought in his own name. *McKillip v. McKillip*, 8 *Barb.* 552; *Lane v.*

Schermerhorn, 1 *Hill*, 97; Petrie *v.* Shoemaker, 24 *Wend.* 85; Davis *v.* Carpenter, 12 *How. Pr.* 287; Person *v.* Warren, 14 *Barb.* 488; Crippen *v.* Culver, 13 *Barb.* 424; Clark *v.* Dunham, 4 *Denio*, 262; *Re* McLaughlin, 1 *Clark Ch. R.* 113.

11. Necessary Averment.—A complaint against the guardian of an habitual drunkard must state with particularity the court and authority by which the debtor was declared an habitual drunkard. *Hall v. Taylor*, 8 *How. Pr.* 428.

12. Personal Actions.—And there is no distinction between actions concerning his realty and those relating to his personal estate, since all actions must be brought in the name of the lunatic. (*Noy*, 27; *Shelf Lunatics*, 395; 19 *Ves.* 312; *Lane v. Schermerhorn*, 1 *Hill*, 97; *McKillip v. McKillip*, 8 *Barb.* 552.) In Alabama, a person may sue an adult lunatic for necessities furnished him, and is entitled to proceed in the case upon the appointment of an attorney for the defendant, although there is no guardian *ad litem*. *Ex parte Northington*, 37 *Ala.* 496.

CHAPTER VIII.

PARTNERS.

No. 68.

i. Title and Commencement of Complaint by Partners.

[STATE AND COUNTY.]

[COURT.]

A. B. and C. D., Partners, under
the firm name of "A. B. & Co.,"
Plaintiffs,

against

E. F. and G. H., Partners, under
the firm name of "E. F. & Co.,"
Defendants.

A. B. and C. D., the plaintiffs in the above entitled action, complain of E. F. and G. H., partners under the firm name of E. F. & Co., and allege:

I. [State cause of action.]

[Demand of Judgment.]

1. Actions between Partners.—As a general rule, no action at law can be maintained between partners pending the relation as such; (Koningsburgh *v.* Launitz, 1 *E. D. Smith*, 215;) although a stipulation by one, for the benefit of the others, may be enforced by them or their trustees, as against a limited partner. (Robinson *v.* McIntosh, 3 *E. D. Smith*, 221.) They cannot sue one another for any of the business or undertakings of the firm. (Buckley *v.* Carlisle, 2 *Cal.* 420; Stone *v.* Fouse, 3 *Cal.* 292; Barnstead *v.* Empire Min. Co., 5 *Id.* 299; Russell *v.* Ford, 2 *Id.* 86; Koningsburgh *v.* Launitz, 1 *E. D. Smith*, 215; but see

Robinson *v.* McIntosh, 3 *E. D. Smith*, 221.) They can only ask for a dissolution and an accounting. (*Id.*) One partner cannot sustain an action against his co-partner for the delivery of personal property belonging to the co-partnership. (Buckley *v.* Carlisle, 2 *Cal.* 420.) But one partner may sue his co-partner on a note. (Van Ness *v.* Forrest, 8 *Cranch C. Ct.* 30.) Or one partner may sue another at law for damages caused by a premature dissolution on breach of co-partnership articles. (Bagley *v.* Smith, 6 *Seld.* 489.) And after division of a specific fund, he may sue for his allotted portion. (Crosby *v.* Nichols, 3 *Bosw.* 450.) So, one partnership firm may sue another, having a mutual partner, for an ascertained balance; (Cole *v.* Reynolds, 18 *N.Y.* 74;) and such mutual partner may elect whether to be plaintiff or defendant in the action.

2. Actions by Partners.—Partners, as such, may maintain joint action against innkeeper for loss of goods. Needles *v.* Howard, 1 *E. D. Smith*, 54.

3. Arbitration.—In Vermont, it was held that a partner has not authority, as such, to submit partnership matters to arbitration so as to make the award binding on the firm. (Martin *v.* Thrasher, 40 *Vt.* 460.) A partner may submit his own interest in the firm to reference, but he cannot thereby bind the other partners. Karthaus *v.* Ferrer, 1 *Pet.* 222; see, also, Lyle *v.* Rodgers, 5 *Wheat.* 394.

4. For an Accounting.—The proper form of complaint for a partnership accounting, in a case similar to the following, should be one alleging that the transaction was a partnership transaction; that the credit of both parties was involved; that the joint names and credits of the two firms, the one as drawers of the bill, and the other as acceptors, were the means by which they procured the moneys by which they bought the goods; that the same were bought on joint account by them as partners in the transaction; that a large amount of the goods, and the proceeds thereof, were on hand; that the joint indebtedness for these goods was outstanding, and should be paid out of the joint property arising out of the transaction; and that an accounting should be between the parties; and that an injunction be granted and a receiver appointed. Davis *v.* Grove, 27 *How. Pr.* 70.

5. Individual Interest.—The interest of a co-partnership cannot be given in evidence on an averment of individual interest; nor an averment of co-partnership interest be supported by a special individual contract. Graves *v.* Boston Mar. Ins. Co., 2 *Cranch*, 419.

6. Joint Assumpsit.—Where suit is brought on a partnership transaction, the complaint stating a contract with the partner sued, evidence may be given of a joint *assumpsit*. *Barry v. Foyles*, 1 *Pet. U.S.* 311.

7. Judgment.—If a complaint in an action against a company by its company name states substantially the conditions mentioned in § 656, of the Practice Act, and the sheriff returns that he has served the summons on one of the members of the company, and judgment by default is entered up against the company by its name, to be enforced against the joint property of the members, the judgment is not void, but may be enforced by execution against the company property. (*Welch v. Kirkpatrick*, 30 *Cal.* 202.) Such judgment is not a judgment against the person served with process, but against the company. (*Gilman v. Cosgrove*, 22 *Cal.* 356.) *Query*. If there is an entire absence of any statement showing the existence of the conditions named in the section, and judgment is rendered against the company by default, is the judgment void, or are the conditions matters to be pleaded in abatement, and if not thus pleaded, waived? *Welch v. Kirkpatrick*, 30 *Cal.* 202.

8. Liability of Partners.—The whole of the partners are liable on a warranty by one of the members, on sale of firm property. (*Sweet v. Bradley*, 24 *Barb.* 549.) One partner is liable to third parties for injuries occasioned by negligence of another. *Cotter v. Bettner*, 1 *Bosw.* 490.

9. Names of Partners.—A partnership consisting of several persons must sue or be sued by their names at length, and not in the name of the firm. 3 *Caines*, 170; *T. R.* 508.

10. Parties.—As to partners as plaintiffs in an action, consult "*Parties*," pp. 89-90, Notes 104-107. As to parties defendant, see p. 113, Note 158.

11. Partners may sue in their individual names, but may give the co-partnership any name they please; (*Crawford v. Collins*, 30 *How. Pr.* 398;) and must show themselves to be the persons composing the firm. *McGregor v. Cleveland*, 5 *Wend.* 475; *Ord v. Portal*, 3 *Camp.* 239, *note*; but see *Wardell v. Pinney*, 1 *Wend.* 217.

12. Partnership, what Constitutes.—Actual intention is necessary to constitute a partnership *inter se*. There must be a joint

undertaking to share in the profit and loss. Each party must, by the agreement, in some way participate in the losses as well as the profits. (2 *Kent Com.* 23-28; *Hazzard v. Hazzard*, 1 *Story*, 373; *Denery v. Cabot*, 6 *Met.* 59; *Murphy v. Whitney*, 10 *Johns.* 228; *Chapion v. Bostwick*, 18 *Wend.* 181; *Patterson v. Blanchard*, 1 *Seld.* 189; *Story on Part.*, §§ 36-60; *Loomis v. Marshall*, 12 *Conn.* 76; *Wheeler v. Farmer*, *Cal. Sup. Ct., Jul. T.*, 1869.) An agreement to divide the gross earnings does not constitute the parties to it partners. 1 *Seld.* 191, *supra*; *Story on Part.*, § 34; and cases cited in Note 3; *Wheeler v. Farmer*, *Cal. Sup. Ct., Jul. T.*, 1869.

13. Partnership Property.—The plaintiff must recover on the allegations in his complaint, if at all, and if the complaint fails to aver that the property was partnership property, the judgment of the Court should not find that fact. *Sterling v. Hanson*, 1 *Cal.* 480.

14. Special Partner.—A special partner in a limited partnership should not be joined with the general partner in an action on a partnership obligation. *Phillips v. Stewart*, *Anth. N.P.* 337.

No. 69.

Against Partners—Averring Partnership.

[STATE AND COUNTY.]

[COURT.]

JOHN DOE, Plaintiff, <i>against</i> A. B. and C. D., Defendants.	}
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The plaintiff complains of the defendants, and alleges:

I. That at the time hereafter mentioned, the defendants were co-partners, and doing business as merchants or traders [*or otherwise*] at the City of, under the firm name of A. B. & Co.

II. [*State cause of action.*]

[*Demand of Judgment.*]

15. Allegation of Partnership.—The same allegation will do where the plaintiffs are partners, substituting the word “plaintiffs” for “defendants.” Where the partnership is a material fact, it should be alleged. See *Ante*, p. 202, n. 8.

16. Averment of Partnership.—A distinct averment of partnership between the plaintiffs is only necessary when the right of action depends upon the partnership. (*Loper v. Welch*, 3 *Duer*, 644; and see *Oechs v. Cook*, *Id.* 161.) When a joint ownership or joint contract will enable them to recover, it is no objection to their complaint that their partnership is not pleaded. For a sufficient, though informal, averment of partnership, see *Anable v. Conklin*, 25 *N.Y.* 470; *Anable v. Stm. Engine Co.*, 16 *Abb. Pr.* 286.

17. Dormant Partner.—At common law, a dormant partner need not and ought not to be joined in a suit by the firm. (2 *Esp.* 468; 7 *T.R.* 361; 2 *Taunt.* 324; 1 *Chitt. Pl.* 9; 3 *Cow.* 84; *Clark v. Miller*, 4 *Wend.* 628; *N.Y. Dry Dock Co. v. Treadwell*, 19 *Wend.* 525.) But the rule would appear to be otherwise under the Code of New York. (See *Secor v. Keller*, 4 *Duer*, 416; and compare *Belshaw v. Colie*, 1 *E. D. Smith*, 213.) But if a dormant partner be unknown in the contract of a lease, it was held that he need not be joined as defendant. (*Hurlbut v. Post*, 1 *Bosw.* 28.) They have the right, but are not bound, to sue all under such circumstances. (*Brown v. Bird-sall*, 29 *Barb.* 549.) Where the name of a dormant partner was fraudulently concealed, an injunction to restrain a levy on partnership property was set aside. *Van Valen v. Russel*, 13 *Barb.* 590.

18. Firm Name.—Partners may be sued by their common name, whether it comprises the names of such persons or not; but the judgment in such case shall bind only the joint property of the associates. *Cal. Pr. Act*, § 656.

*No. 70.*iii. *By a Surviving Partner.*

[STATE AND COUNTY.]

[COURT.]

JOHN DOE, Plaintiff, <i>against</i> RICHARD ROE, Defendant.	}
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The plaintiff complains, and alleges:

I. That at the time hereafter mentioned, the plaintiff and one C. D. were partners, doing business as merchants or traders [*or otherwise*] at the City of, under the firm name of "John Doe & Co."

II. [*Statement of cause of action.*]

III. That on the day of, 187., at, said C. D. died, leaving the plaintiff the sole survivor of the firm.

[*Demand of Judgment.*]

19. Cause of Action.—This form is necessary only when the cause of action accrued to the partnership.

20. Duties.—The surviving partner is to wind up the affairs of the partnership, and pay its debts out of the assets, if sufficient, and divide the residue, if any, among those entitled to it. (*Gleason v. White*, 34 *Cal.* 258.) And a claim of the surviving partner against the estate of the deceased partner is contingent, and does not become absolute till the partnership affairs are settled.

21. Partnership Debt.—An action at law does not lie against the personal representative of the deceased partner. It must be brought against the survivor. (*Grant v. Shurter*, 1 *Wend.* 148.) So, when one of two joint covenanters dies. *Gere v. Clarke*, 6 *Hill*, 350.

22. Promise, how Stated.—In an action for money paid, etc., to the use of the partnership, if one of the partners died previous to the time the right of action accrued, the promise must be stated to have been made by the survivors alone. 6 *T. R.* 363; 1 *Johns.* 36; *Tom v. Goodrich*, 2 *Johns.* 213.

23. Right of Possession.—A surviving partner has the exclusive right of possession, and the absolute power of disposition of the assets of the partnership. *Allen v. Hill*, 16 *Cal.* 113.

24. Services.—He is not entitled to pay for his services in merely winding up the affairs of the concern. (*Griggs v. Clark*, 23 *Cal.* 427.) But if he expends his time and labor in the care and management of the partnership property, by which its value is enhanced, he should receive compensation for the same.

25. Survivor, Liabilities of.—The survivor of a partnership may be charged on the debt of a firm, contracted before the death of the other, and without averring the partnership, death, etc. (*Goelet v. McKinstry*, 1 *Johns. Cas.* 405; compare *Holmes v. De Camp*, 1 *Johns.* 34.) And the personal representative of a deceased partner cannot be joined with him, unless survivor be insolvent. (*Voorhis v. Child*, 17 *N.Y.* 354; *Moorehouse v. Ballou*, 16 *Barb.* 289; *Higgins v. Freeman*, 2 *Duer*, 650.) Where, after the death of one partner, on account stated between defendant and the co-partnership, admitting balance due for goods sold in the lifetime of deceased, the survivor may recover it on *insimul computassent*, without averring the death of the other partner, *Holmes v. De Camp*, 1 *Johns.* 34.

CHAPTER IX.

PUBLIC OFFICERS.

No. 71.

i. *By or Against Public Officers.*

[STATE AND COUNTY.]

[COURT.]

A. B., [Comptroller] of the State of California, Plaintiff, <i>against</i> C. D., Defendant.	}
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The plaintiff complains, and alleges :

I. That he is [Comptroller of the State of California].

II. [*State the cause of action, etc.*]

[*Demand of Judgment.*]

1. Actions Against Officers.—That in an action against the collector of the customs for refusing a clearance, a count stating that the plaintiff was the owner of the vessel, laden with a cargo of a certain value, the allegation is sufficient as respects ownership of the cargo, see *Bas v. Steele*, 3 *Wash. C. Ct.* 381.

2. Acts of Deputy.—In an action against a sheriff for wrongful acts of deputy, it is not essential that the complaint should allege that he is sheriff, nor that the acts complained of were committed by his deputy. (*Poinsett v. Taylor*, 6 *Cal.* 78; *Curtiss v. Fay*, 37 *Barb.* 64.) The act of the deputy should be alleged as that of the sheriff. *People v. Ten Eyck*, 13 *Wend.* 448.

3. Official Character must be Averred.—The official character must be averred in the body of the complaint. (*Guthries v. Fisher*, 3 *Stark*, 151; compare *Gould v. Glass*, 19 *Barb.* 185, with *Smith v. Levinus*, 8 *N.F.* 447; and see *Merritt v. Seaman*, 2 *Seld.* 168; *Ogdensburgh Bk. v. Van Rensselaer*, 6 *Hill*, 240; *Delafield v. Kinney*, 24 *Wend.* 345; *Hunt v. Van Alstyne*, 25 *Id.* 605; *Fowler v. Westervelt*, 17 *Abb. Pr.* 59; 40 *Barb.* 374; *Stewart v. Greaves*, 2 *Dowl.* 405; 10 *M. & W.* 711; *Davidson v. Bower*, 5 *Scott N. R.* 539.) A very short averment, if clear in its terms, is sufficient. (*Smith v. Levins*, 4 *Seld.* 472; *Root v. Price*, 22 *How. Pr.* 372; *Hallett v. Harrower*, 33 *Barb.* 537.) Though a special authority must be averred with fulness sufficient to make it clearly apparent. (*Id.*) But a sheriff suing as such need not state in his complaint how he acquired his office. It is enough to show that he is sheriff in fact. *Kelly v. Breusing*, 33 *Barb.* 123; affirming *S.C.*, 32 *Id.* 601.

4. Official Capacity, How Averred.—That “the plaintiff is Sheriff of the City and County of San Francisco,” is a sufficient allegation of his official character. (*Kelly v. Breusing*, 32 *Barb.* 601: affirmed in 33 *Barb.* 123.) Where the title gives the names of the plaintiffs with the description “commissioners of highways,” and in the body of the complaint it is averred “that the plaintiffs, commissioners of highways, complain,” the character in which they complain is sufficiently indicated. *Fowler v. Westervelt*, 40 *Barb.* 374.

5. Title.—A party suing as a public officer should sue in his own name, with the addition of his name of office. (*Paige v. Fazackerly*, 36 *Barb.* 392; *Trustees, Fire Department of Brooklyn v. Acker*, 26 *How. Pr.* 263; *Fowler v. Westervelt*, 40 *Barb.* 374; 17 *Abb. Pr.* 59.) The words in brackets in the above form may be substituted by any others which will properly designate the title and jurisdiction over which the officer officiates.

No. 72.

ii. *By Sheriff Suing in Aid of Attachment.*

[TITLE.]

• The plaintiff complains, and alleges:

1. That he is the Sheriff of the [City and] County of, duly elected, qualified, and acting as such.

II. That on the day of, 187., a warrant of attachment was issued out of this Court, and to him directed and delivered, as such Sheriff, in an action against A. B., whereby he was directed to attach and keep all the property of said A. B. in his County.

III. That the defendant then had in his possession dollars belonging to A. B. [*or* was indebted to the said A. B. in the sum of dollars].

IV. That on the day of, 187., the plaintiff made due service of said warrant by delivering to, and leaving with said defendant a copy, with a notice showing the property levied on; whereupon the plaintiff became entitled to receive from the defendant, and he became answerable to the plaintiff for said dollars, which the defendant refuses to pay over to the plaintiff, or to account to him therefor; to his damage dollars.

[*Demand of Judgment.*]

6. Form.—This form with slight changes, from ABBOTTS' excellent work on forms, is not applicable under the California statute; but being an approved form under the statute of the State of New York, is deemed of value here. See *Kelly v. Breusing*, 33 *Barb.* 123; affirming *S.C.*, 32 *Id.* 601.

7. Right of Action.—The sheriff who levies an attachment has not the right of property in the debt, and cannot maintain an action in his own name for the recovery thereof. (*Sublette v. Melhado*, 1 *Cal.* 105.) An indemnity bond to the sheriff to retain property seized under attachment, is an instrument necessary to carry the power to sue into effect. *Davidson v. Dallas*, 8 *Cal.* 227.

No. 73.

iii. *Against Sheriff for not Executing Process.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of issuing the execution hereinafter mentioned, the defendant was the Sheriff of the County of Sacramento, in this State.

II. That on the day of, 187., at, judgment was [duly] rendered in an action in the Court, in favor of the plaintiff, against one E. F., for [one thousand] dollars.

III. That on the day of, 187., an execution against the property of the said E. F. was issued upon the said judgment, directed and delivered to the defendant as Sheriff aforesaid.

IV. That on that day the said E. F. had [a large quantity of general merchandise] in his store, No. . . . First Street, San Francisco, and owned the said store and lot [*or as the case may be*], in the said County, out of which the said execution might have been satisfied; of which the defendant had notice.

V. That he refused and neglected to make a levy under or by virtue of said execution, upon said property, or any part thereof [*or as the case may be; and if he levies a part, specify it*].

[Demand of Judgment.]

8. **Arrest, Neglecting to Execute Order of.**—That before the return of said order, to wit, on, etc., notice was given to the defend-

ant that said E. F. was within the said County, and that the defendant there had said E. F. in his view and presence, so that if the defendant had desired so to do, he could have arrested the said E. F. by virtue of said order; but the defendant disregarding his duty, did not arrest the said E. F., and wilfully neglected the execution of said order. *Dunning v. Fay*, 38 *Barb.* 18.

9. Averment of Official Capacity.—That defendant was sheriff, or acted as such, is a sufficient averment of capacity. *Potter v. Luther*, 3 *Johns.* 431; *Dean v. Gridley*, 10 *Wend.* 255; and see *Hall v. Luther*, 13 *Id.* 491; compare *Curtis v. Fay*, 37 *Barb.* 64.

10. Breach of Duty.—That although defendant could have levied, of goods of the execution-debtor within his bailiwick, the moneys indorsed on the writ, yet defendant, disregarding his duty, did not levy of the said goods, the moneys, or any part thereof, sufficiently charges a breach of duty, and implies improper conduct in the sale of the goods. *Mullett v. Challis*, 16 *Q.B.* 239; 20 *Law J. R. (N.S.) Q.B.* 161; 15 *Jur.* 243.

11. Illinois.—The action lies where the officer so delays in making a proper levy that the rights of third parties intervene. (31 *Ill.* 120.) The damages on failure to collect an execution are such as the plaintiff shall actually suffer by the sheriff's neglect. (30 *Ill.* 339.) Where the sheriff accepts an assignment of a chattel mortgage, the plaintiff in execution, being ignorant thereof, is not bound by his acts. 28 *Ill.* 48.

12. Notice.—The allegation of notice, though usual, seems unnecessary. *Tomlinson v. Rowe*, *Hill & D. Supp.* 410.

13. Omission of Duty.—The mere omission of a deputy to inform the sheriff of having process in hand is not such negligence as to charge the sheriff, in case a writ last in hand was executed first. *Whitney v. Butterfield*, 13 *Cal.* 335.

14. Refusal to make Deed.—In an action against a sheriff for special damages, resulting from a refusal on the part of the sheriff to make and deliver to plaintiff a deed to certain premises purchased by plaintiff at sheriff's sale, when there is no allegation in the complaint of title, nor any averment that in case the deed had been executed,

plaintiff would have been able to recover possession of the premises, or the rents and profits; *Held*, that such complaint is insufficient. *Knight v. Fair, Sheriff*, 12 *Cal.* 296.

15. Replevin.—For the proper mode of declaring in a complaint against a sheriff for not taking sufficient security in replevin, or in executing a writ in replevin, see (*Gibbs v. Bull*, 18 *Johns.* 435; *West-evelt v. Bell*, 19 *Wend.* 531.) Where defendant had a right to replevy, a complaint which avers that the marshal neglected to make the money, is bad. *Bispham v. Taylor*, 2 *McLean*, 355.

16. Selling Homestead.—A complaint against a sheriff and his sureties for selling under execution the homestead of plaintiffs, which set out that the sheriff was in possession of a certain execution against plaintiff, J. Kendall, and under color of said execution wrongfully and illegally entered upon and sold certain property, the homestead of plaintiffs, and averring damages in the sum of \$2,000, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action. No damage has, or can result from such a sale. If the property sold was a homestead, the sheriff's deed conveyed nothing. The purchaser at sale could acquire no right to the property, nor could the plaintiff suffer any injury. *Kendall and Wife v. Clark*, 10 *Cal.* 17.

17. Terms of Execution.—It is not necessary to state the terms of the execution. The Court takes judicial notice of its own forms of proceeding. *N.Y. Code Commrs.*

No. 74.

iv. Against Sheriff for Neglecting to Return Execution.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of the issuing of the execution hereafter mentioned, the defendant was the Sheriff of the County of, in this State.

II. That on the day of, 187., in an

action in the District Court of the Judicial District, County of, in this State [*or other court*], wherein this plaintiff was plaintiff, and one A. B., was defendant, the plaintiff recovered a judgment duly given by said Court, against the said A. B., for dollars.

III. That on the day of, 187., an execution against the property of said A. B. was issued on said judgment, and directed and then delivered to the defendant, as Sheriff of the County of, of which execution the following is a copy: [*copy the execution and indorsement.*]

IV. That although [more than] days elapsed after delivery of said execution to the defendant, and before the commencement of this action, yet he has, in violation of his duty as such Sheriff, failed to return the same, to the damage of the plaintiff dollars.

[*Demand of Judgment.*]

NOTE.—Under our practice, the rights of the party are obtained by motion.

18. Issue of Process.—It is sufficient, after showing jurisdiction to issue process, to allege that it was issued. *French v. Willett*, 4 *Bosw.* 649; *S.C.*, 10 *Abb. Pr.* 99.

19. Property.—In an action for not returning an execution, the complaint need not aver that defendant had property out of which the money might have been levied. The gist of the action is the neglect to return. (*Pardee v. Robertson*, 6 *Hill*, 550.) If the fact that defendant had such property is not averred, the plaintiff cannot prove it. *Stevens v. Rowe*, 3 *Den.* 327; compare *Ledyard v. Jones*, 7 *N.Y.* 550.

20. Remedy.—Plaintiff may proceed by attachment, or may sue for the neglect. (*Burk v. Campbell*, 15 *Johns.* 456; *Bank of Rome v. Curtiss*, 1 *Hill*, 275.) This action lies, although the sheriff has not been ordered to make return. *Burk v. Campbell*, 15 *Johns.* 456; *Bank of Rome v. Curtiss*, 1 *Hill*, 275; *Pardee v. Robertson*, 6 *Id.* 550; *Stevens v. Rowe*, 3 *Den.* 327.

21. Request.—A request to return execution need not be alleged. *Corning v. Southland*, 3 *Hill*, 552; *Fisher v. Pond*, 2 *Id.* 338; *Howden v. Stannish*, 6 *C.B.* 504; *S.C.*, 60 *Eng. Com. L. R.* 503.

No. 75.

v. Against Sheriff, for Neglecting to Pay over Moneys Collected on Execution.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereafter mentioned, the defendant was the Sheriff of the County of, in this State.

II. That on the day of, 187., at, an execution, then duly issued, in form and effect as required by law, against the property of one A. B., and in favor of the plaintiff, upon a judgment for the sum of dollars theretofore duly given in favor of the plaintiff against said A. B., in the District Court of the Judicial District, County of, in this State, was by the plaintiff directed and delivered to the defendant as such sheriff.

III. That the defendant thereafter, as such sheriff, collected and received upon said execution, to the use of the plaintiff, the sum of dollars, besides his lawful fees.

IV. That although [more than] sixty days elapsed,

after the delivery of said execution to the defendant, before this action, yet he has, in violation of his duty as such sheriff, failed to pay over to the plaintiff the amount so collected.

[*Demand of Judgment.*]

22. Against Deputy.—To render a deputy liable in the latter case, an express promise must be shown. *Tuttle v. Love*, 7 *Johns.* 470; *Paddock v. Cameron*, 8 *Cow.* 212; and see *Colvin v. Holbrook*, 2 *N.F.* 126; affirming *S.C.*, 3 *Barb.* 475.

23. Delivery of Execution.—It is enough to show the delivery of the execution, without proving the judgment. *Elliot v. Cronk*, 13 *Wend.* 35; and see 1 *Cow. Tr.* 322.

24. Demand.—In an action against a sheriff to recover property seized under process, or its value, by the owner, it is necessary that the plaintiff should show affirmatively notice and demand before bringing suit; otherwise he cannot recover in such action. (*Killey v. Scannell*, 12 *Cal.* 73; *Boulware v. Craddock*, 30 *Cal.* 190.) The rule of the common law is correctly stated in (*Ledley v. Hays*, 1 *Cal.* 160), and the correctness of that decision is impliedly recognized in *Daumiel v. Gorham*, 6 *Cal.* 44; see, also, *Codman v. Freeman*, 3 *Cush.* 314; and *Ackee v. Campbell*, 23 *Wend.* 371; *Brewster v. Van Ness*, 18 *Johns.* 133; *Dygert v. Crane*, 1 *Wend.* 534; and see *Shepard v. Hoit*, 7 *Hill*, 198.

25. Money Paid Over.—Where it is averred in the complaint that the money has been collected, and that defendant has failed to return the execution, it will not be presumed that the money has not been paid over. An averment to this effect is essential. *Hoag v. Warden*, *Cal. Sup. Ct., Jul. T.*, 1869.

26. Obligation to Pay.—So, to say that plaintiff has been obliged to pay to the amount of, etc., in consequence of the negligence and acts of the defendant in his office of under-sheriff, is good, at least on general demurrer; (*Hughes v. Smith*, 5 *Johns.* 168;) even if process is voidable. *Walden v. Davison*, 15 *Wend.* 575; *Bacon v. Cropsey*, 7 *N.F.* 195; and see *Ontario Bank v. Hallett*, 8 *Cow.* 192; *Grosvenor v. Hunt*, 11 *How. Pr.* 355; *Ginochio v. Orser*, 1 *Abb. Pr.* 433.

27. Remedy.—An action on the case, or an action for money had and received, may be maintained, at the option of the plaintiff. *Dygart v. Crane*, 1 *Wend.* 534; *Shepard v. Hoit*, 7 *Hill*, 198.

28. Statute Penalties.—Where a sheriff fails to pay over money collected on execution, the action should be for a false return. (*Egery v. Buchanan*, 5 *Cal.* 53.) The statute penalties against sheriffs, for the non-payment of moneys collected on execution, are only recoverable when the sheriff, by his return, admits the collection of the money, but refuses to pay it over. *Id.*

29. Sufficient Averment.—It is enough to say generally that the defendant had collected or embezzled, etc., such a sum, which he had refused, etc., without setting forth the particular items, which would lead to prolixity. *Postmaster-General v. Cochran*, 2 *Johns.* 413; *Hughes v. Smith*, 5 *Id.* 168.

No. 76.

iv. Against Sheriff, for False Return.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of issuing the execution herein-after mentioned, the defendant was the Sheriff of the County of, in this State.

II. That on the day of, 187., at, judgment was [duly] rendered in an action in the Court, in favor of the plaintiff, against on G. W., for [ten thousand] dollars.

III. That on the day of, 187., an execution against the property of the said G. W. was issued upon the said judgment, directed and delivered to the defendant, as sheriff aforesaid.

IV. That the defendant levied, under the said execution, on property of the said W. [of the value of ten

thousand dollars; *or* sufficient to satisfy the said judgment, with all the expenses of the execution; *or* state particulars of property, on which he might have levied.]

V. That the defendant afterwards falsely returned upon the said execution, to the Clerk of the County of, that the said W. had no property in his County on which he could levy the amount of said judgment, or any part thereof.

VI. That by means of said premises, the plaintiff has been deprived of the means of obtaining the said moneys directed to be levied as aforesaid, and which are still wholly unpaid, and is likely to lose the same.

[*Demand of Judgment.*]

30. Allegation for not Levying when there was an Opportunity, and Falsely Returning Nulla Bona.—That the defendant neglected to make any levy on the goods and chattels, lands and tenements, of the said G. W.; and falsely and fraudulently returned upon the said writ to the said Court, that the said G. W. had not any goods or chattels, lands or tenements, in his County. That by reason of the premises, the plaintiff is deprived of his remedy for obtaining payment of his judgment and costs aforesaid, and has wholly lost the same.

31. Another Form of Allegation.—That the defendant, so being Sheriff as aforesaid, and having the said order in his hands to execute, and knowing that the said G. W. was in his County and view as aforesaid, falsely and deceitfully returned on the same order to said Court, that the said G. W. could not be found in his County.

32. Cause of Action.—The cause of action for a false return arises only on actual return of the writ; but it relates back to the return day, and the false return is properly alleged to have been on that day. (*Michaels v. Shaw*, 12 *Wend.* 587.) An officer who should refuse to proceed upon a second execution would be liable for a false return.

(26 *Ill.* 221; 31 *Ill.* 120; 15 *Ind.* 43.) A "fee bill" is a process, and governed by the same rule as executions. 2 *Gilm.* 678; 5 *Id.* 96; 17 *Ill.* 344; 4 *Scam.* 560; 3 *Met. (Ky.)* 184; 24 *Tex.* 12.

33. Measure of Damage.—The plaintiff is entitled, *prima facie*, to the face of the execution. (*Ledyard v. Jones*, 3 *Seld.* 550; *Rome v. Curtiss*, 1 *Hill*, 275; 6 *Id.* 550; 9 *Johns.* 300; 10 *Mass.* 474.) And in case of loss of property by negligence, the damages are the value of the property lost. *Morgan v. Myers*, 14 *Ohio*, 538; *Smith v. Fuller*, 14 *Ohio*, 545.

34. Special Damages.—It is not essential to aver any special damage. The amount due on the judgment is, *prima facie*, the measure of damages. *Ledyard v. Jones*, 7 *N.Y.* 550; affirming S.C., 4 *Sandf.* 67; *Pardee v. Robertson*, 6 *Hill*, 550; *Bank of Rome v. Curtiss*, 1 *Id.* 275; and see *Bacon v. Cropsey*, 7 *N.Y.* 185.

35. That Return was False.—The complaint should show that the return was false, and that the respect in which it was false is material. *Kidzie v. Sackrider*, 14 *Johns.* 196; *Houghton v. Swarthout*, 1 *Den.* 589.

36. Valid Judgment.—In such action, plaintiff must prove a valid judgment. *McDonald v. Bunn*, 3 *Den.* 45.

No. 77.

v. *For Seizing a Vessel.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff is, and at the time hereinafter mentioned was, the owner of [*naming the vessel*], her tackle, apparel, and furniture, and that he had chartered the same to one A. B., for a voyage from to, and back, for dollars per week.

II. That when said vessel was at, on her voyage aforesaid, and in the possession of C. D., her

master, appointed by the plaintiff, the defendants, on or about the day of, 187., forcibly seized the same with her apparel, furniture, and cargo, of the value of dollars, and brought the same to

III. That in consequence thereof the plaintiff has lost the said vessel, her apparel, equipments, and furniture, and the money which he was to receive for the charter for the period of weeks, and has been put to great cost and expense in and about asserting and maintaining his rights to said vessel, her tackle and furniture.

[*Demand of Judgment.*]

No. 78

vi. *For an Escape.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of issuing the execution and of the escape hereafter mentioned, the defendant was the Sheriff of the County of, in this State.

II. That on the day of, 187., in an action in the [District Court of the Judicial District, County of, in this State], brought by this plaintiff against one A. B. for embezzlement [*or other case authorizing arrest*], this plaintiff recovered judgment, duly given by said Court, against said A. B., for dollars.

III. That on the day of, 187., an execution against the property of said A. B. was duly issued by the Clerk of said Court on said judgment, and thereafter duly returned wholly unsatisfied.

IV. That thereafter, on the day of, 187., an order of arrest was issued from the Judge of the said Court [*or* from the County Judge], against the person of said A. B., and then directed and delivered to the defendant as said sheriff, whereby he was required to arrest said A. B. and to commit him to the jail of said County, until he should be discharged according to law.

V. That thereafter the defendant, as such sheriff, arrested said A. B. and committed him to jail, pursuant to said execution, or order of arrest.

VI. That thereupon the plaintiff entered into an undertaking, with good and sufficient securities, duly executed and approved, conditioned to the payment of the expenses of said A. B. for necessary food, clothing, and bedding [*or* state a deposit for this purpose].

VII. That in violation of his duty as such sheriff, he has since, to wit, on the day of, 187., without the consent of the plaintiff, permitted said A. B. to escape.

Wherefore the plaintiff demands judgment against the defendant, according to the statute, for the debt [*or* for damage, *or* sum of money] for which such prisoner was committed, to wit, dollars, with interest from, etc.

37. Arrest for Contempt.—A complaint in an action against a sheriff, for the escape from his custody of a person arrested by him upon a process for contempt, which alleges that the sheriff “suffered and permitted such person to escape and go at large,” states a voluntary and not a negligent escape; and an answer which avers that such person may have “wrongfully and privily, and without the knowledge, per-

mission, or consent of this defendant, escaped," etc., and that "if he did so escape, he afterwards" returned into custody, etc., is insufficient as a pleading, as it does not deny, either generally or specifically, the allegation that the sheriff permitted the prisoner to escape. *Loosey v. Orser*, 4 *Bosw.* 391.

38. Authority to Release.—The general authority of the attorney as such, is not sufficient to authorize the sheriff to discharge the prisoner upon his consent. *Kellogg v. Gilbert*, 10 *Johns.* 220.

39. Committed.—That he had arrested the debtor and detained him in custody in execution, sufficiently imports commitment to jail. *Ames v. Webbers*, 8 *Wend.* 545.

40. Damages.—The measure of damages is only *prima facie* the amount of the debt. (*Ginocchio v. Orser*, 1 *Abb. Pr.* 433; *Potter v. Lansing*, 1 *Johns.* 215; *Russell v. Turner*, 7 *Id.* 189; *Rawson v. Dole*, 2 *Id.* 454; *Thomas v. Weed*, 14 *Id.* 255; *Littlefield v. Brown*, 1 *Wend.* 398; *Patterson v. Westervelt*, 17 *Id.* 543; *Fairchild v. Case*, 24 *Id.* 381; 8 *Id.* 545; *Hutchinson v. Brand*, 9 *N.Y.* 208; see, also, *Daguerre v. Orser*, 3 *Abb. Pr.* 86.) A complaint which claimed the amount of the debt, with interest and costs, without using the word damages, is equivalent to a declaration in debt. *Renick v. Orser*, 4 *Bosw.* 384; *McCreery v. Willett*, *Id.* 643.

41. Escape, Definition of.—If a person admitted to the liberties of the jail limits is without such limits by virtue of a valid legal process which affords justification to the officer taking him thence, it is not to be deemed an escape within the meaning of 2 *Rev. Stat.* 437, § 63, although that section contains no express exception to the rule that being without the boundaries is an escape. To constitute an escape there must be some agency of the prisoner employed, or some wrongful act by another against whom the law gives a remedy. (*Allen on Sheriffs*, 231; 4 *Mass.* 361; 10 *Mass.* 206.) The act of the law, as well as the act of God or of the public enemies, will excuse the sheriff in an action for escape. *Wilkens v. Willett*, 1 *Keyes*, 521; affirming *S. C.*, *sub nom.* *Wickelhausen v. Willett*, 12 *Abb. Pr.* 319; 21 *How. Pr.* 40.

42. Excuse.—Nothing but the act of God or public enemies will excuse the sheriff for an escape. *Fairchild v. Cox*, 24 *Wend.* 381; *Rainey v. Dunning*, 2 *Murph.* 386.

43. Form of Allegation in Debt.—That thereupon, the judgment remaining wholly unpaid, the defendant became indebted to the plaintiff in the sum of dollars, the amount of said judgment. (*Barnes v. Willet*, 11 *Abb. Pr.* 225; *S. C.*, 19 *How. Pr.* 564; so in *Renick v. Orser*, 4 *Bosw.* 384; and *McCreery v. Willett*, *Id.* 643.) This form is equivalent to a declaration in debt.

44. Indorsement.—The indorsement on the execution or writ need not be set out. *Jones v. Cook*, 1 *Cow.* 309.

45. Liability as Bail.—If, after being arrested, the defendant escape or be rescued, the sheriff shall himself be liable as bail; but he may discharge himself from such liability by the giving and justification of bail, at any time before judgment. (*Gen. Laws of Cal.* ¶ 5,035.) Whether a judgment-creditor, injured by the escape of his debtor from arrest, elects to sue the sheriff at common law for an escape, or under § 201 of the Code of Procedure of New York, as bail, is manifested by the complaint. If he proceeds against the sheriff as bail, he must set forth the proceedings to, and including the escape, and allege that the defendant is bail, and must bear the appropriate judgment. If he elects to prosecute for an escape, the complaint will contain the same matters, but all allegations as to the character of the defendants as bail should be omitted, as wholly irrelevant to the cause of action for an escape. A complaint in such a case, which makes no mention of the defendant as bail, and contains nothing manifesting an intention or election to hold him liable in that character, is to be treated as intending on an action for an escape. *Smith v. Knapp*, 30 *N.Y.* 581.

46. Negligence.—An officer who negligently permits an escape is liable to the person injured by his neglect of duty. (1 *Wend.* 115; 37 *Ill.* 257.) And an escape from a deputy may be declared on as an escape from the sheriff. 9 *N.H.* 204.

47. Voluntary.—A complaint which alleges that “the sheriff suffered and permitted such person to escape and go at large,” states a voluntary and not a negligent escape. (*Loosey v. Orser*, 4 *Bosw.* 391.) Under the averment that he voluntarily suffered the party to escape, a negligent escape may be proved. (2 *T. R.* 126; 5 *Burr.* 2,814; 1 *Saund.* 35.) And evidence of a negligent escape supports an action for a voluntary one. *Skinner v. White*, 9 *N.H.* 204.

CHAPTER X.

RECEIVERS.

No. 79.

i. By a Receiver Appointed Pending Litigation.

[STATE AND COUNTY.]

[COURT.]

A. B., Receiver of the Property of C. D., Plaintiff, <i>against</i> E. F., Defendant.	}
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The plaintiff, as receiver of the property of C. D., complains, and alleges:

I. [State cause of action.]

II. That on the day of, 187., at the City and County of San Francisco, and State of California, in an action then pending in the District Court of the Judicial District of said State, wherein C. D. was plaintiff and E. F. was defendant, upon an application made by the said A. B., and by order duly made by said Court [*or Judge*], this plaintiff was appointed receiver of the property hereinafter described.

III. That thereafter, and before the commencement of the present action, he gave his bond required by the said order, as such receiver, approved by the said Judge,

which bond, with such approval, are on file in the said Court, and were so filed prior to the commencement of this action.

[*Demand of Judgment.*]

1. Alleging Appointment.—A receiver suing by virtue of his title and authority should state the time and place of his appointment, and distinctly aver that he has been appointed by an order of the Court. (*White v. Low*, 7 *Barb.* 204; *Gillett v. Fairchild*, 4 *Den.* 80; *Bangs v. McIntosh*, 23 *Barb.* 596; 5 *Duer*, 672; 13 *How. Pr.* 413; 7 *Barb.* 206; 3 *Kern.* 83; *Dayton v. Connah*, 18 *How. Pr.* 326.) Where a receiver would make title to a chose in action, he must set forth the facts showing his appointment. It will not be sufficient to aver that he was *duly appointed*. *Gillett v. Fairchild*, 4 *Den.* 80; *White v. Joy*, 3 *Kern.* 86; *Chatauque Co. Bank v. White*, 2 *Seld.* 236; *Bangs v. McIntosh*, 23 *Barb.* 591; *Stuart v. Beebe*, 28 *Barb.* 34; *Tuckerman v. Brown*, 11 *Abb. Pr.* 389.

2. Appointment of Receiver.—A receiver may be appointed by the Court in which the action is pending, or by a judge thereof, before judgment provisionally, or after judgment; to dispose of the property according to the judgment, or preserve it pending an appeal; and in such other cases as are in accordance with the practice of courts of equity. (*Cal. Pr. Act*, § 143; *N.Y. Code*, § 244.) A receiver is appointed on behalf of all the parties who may establish rights in the cause, and the money in his hands is in *custodia legis*. *Adams v. Woods*, 8 *Cal.* 306.

3. Appointment Pending Litigation.—When either party establishes a *prima facie* right to the property, or to an interest in the property, the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired, the Court or a judge thereof may appoint a receiver. (*Cal. Pr. Act*, § 143.) In a foreclosure suit, the plaintiff has no right to have a receiver of rents and profits of the mortgaged property appointed pending the litigation. *Guy v. Ide*, 6 *Cal.* 101.

4. Appointment after Judgment.—In an action to recover possession of real estate, and while a motion for a new trial is pending, a receiver of the rents and proceeds of the property in dispute may be appointed, if the facts of the case are such as warrant it. If the defendant in possession is receiving monthly large sums of money from the sale of the waters of mineral springs on the land, and is insolvent, a receiver may be appointed, pending the further litigation, on motion for a new trial and appeal. *Whitney v. Buckman*, 26 *Cal.* 447.

5. Bound by Order of Court.—Receivers, or other custodians of money in the hands of a court, as they are bound to obey orders of the Court in their relation to the fund, as well as regards its safe custody as its return, are co-relatively entitled to the protection of the Court against loss for disbursements which were necessary and proper, and such as a reasonable and prudent man, acting as receiver, would have been justified in expending. *Adams v. Haskell*, 6 *Cal.* 475.

6. County Judge.—Under the statute, the County Judge may grant an injunction in cases in the District Court, but he cannot appoint a receiver; at least, not as a thing distinct from the injunction. *Ruthrauff v. Kresz*, 13 *Cal.* 639.

7. Courts of Equity.—Courts of equity have the power to appoint receivers, and to order them to take possession of the property in controversy, whether in the immediate possession of the defendant or his agents; and in proper cases, they can also order the defendant's agents or employees, although not parties to the record, to deliver the specific property to the receiver. (*Ex parte Cohen*, 5 *Cal.* 494.) But they cannot appoint a receiver, and decree a sale of the property and affairs of a corporation. (*Neall v. Hall*, 16 *Cal.* 148.) Such a decree would necessarily result in a dissolution of the corporation. (*Id.*) Where the allegations of a bill are general, and the equities are fully denied, such a case is not presented as will justify the appointment of a receiver, and the withdrawal of the property from the hands of one intimately acquainted with all of the affairs of the concern, and placing it in the hands of another, who may not be equally competent to manage the business. *Williamson v. Monroe*, 3 *Cal.* 385.

8. Describing Himself.—Describing himself as "having been duly appointed receiver of, etc., and bringing this suit by order of the Supreme Court," is insufficient on demurrer. See authorities cited above, Note 1; see, also, *Dayton v. Connah*, 18 *How. Pr.* 326.

9. Disbursements of Receiver.—An order of Court directing a referee "to ascertain and report the amount of disbursements and expenses made with or under the direction and authority of the Court," by a receiver or custodian of money in the hands of the Court, is too narrow to do him justice, and should be so enlarged as to allow for all reasonable and proper expenses incident to the receivership. (*Adams v. Haskell*, 6 *Cal.* 475.) And this, although the claim is for disbursements, incurred by the custodian of the fund, under an appointment as assignee in a proceeding in insolvency, which was afterward held to be void.

10. Discretion of Court.—The appointment of a receiver rests in the sound discretion of the Court upon a view of all the facts; one of which is, that the party asking the appointment should make out a *prima facie* case; and after an *ex parte* appointment has been made, the order may be vacated, either before or after the trial, upon a proper showing. *Copper Hill Min. Co. v. Spencer*, 25 *Cal.* 15.

11. Leave of Court.—Leave to sue need not be averred, as it is not one of the facts constituting the cause of action. *Finch v. Carpenter*, 5 *Abb. Pr.* 235.

12. Mining Claims.—The purchaser at judicial sale of a mining claim, may, where the judgment-debtor remains in possession, working the claims, and is insolvent, have a receiver appointed to take charge of the proceeds, during the period allowed by the statute for redemption. (*Hill v. Taylor*, 22 *Cal.* 191.) That justices of the peace may appoint receivers in actions respecting mining claims, see (*Cal. Pr. Act*, § 651.) As to the duties of receivers appointed under this section, see *Cal. Pr. Act*, § 652.

13. On Application for Injunction.—If notice is given of an application for an injunction, and the petition prays for an injunction, the Judge, on the hearing, may appoint a receiver, if the facts make out a proper case for a receiver, and no objection is made on the ground of want of notice of the application. *Whitney v. Buckman*, 26 *Cal.* 447.

14. Pleadings.—Of the proper mode of complaining in an action by a receiver, of departure from the complaint in the reply, and of the proper mode of seeking relief where the reply departs from the complaint, see *White v. Joy*, 3 *Kern.* 83; rev'g. S.C., 11 *How. Pr. R.* 36; 2 *Abb. Pr.* 548.

15. Powers and Duties of Receiver.—A receiver may employ counsel. (*Adams v. Woods*, 8 *Cal.* 315.) Upon the application of the receiver, in the suit for dissolution, he can obtain the necessary proceedings for procuring a correct application of the balance of a judgment held by the partnership against a third party, after paying the judgment-creditor of the partnership. (*Adams v. Hackett*, 7 *Cal.* 187.) A receiver can pay out nothing, except on an order of the Court; but there are exceptions to the rule; nor will he be denied reimbursements in every case in which he neglects to obtain the order, especially in a court of equity. (*Adams v. Woods*, 15 *Cal.* 207; *Adams v. Haskell*, 6 *Cal.* 475.) It will not be presumed that the receiver has transcended his duties and taken possession of property to which he was not entitled; nor is the opposite party entitled to have issues framed and submitted to a referee or jury to ascertain the ownership of the money in the receiver's hands. *Whitney v. Buckman*, 26 *Cal.* 451.

16. Receiver in his own Name.—As to the cases in which a receiver may sue in his own name and without averring his appointment, see *White v. Joy*, 13 *N.F.* 83; *Bank of Niagara v. Johnson*, 8 *Wend.* 645; *Haxtun v. Bishop*, 3 *Id.* 13.

17. Receiver of Insurance Company.—Where a plaintiff claims title to a note sued on by virtue of his appointment as receiver of an insurance company, the note being payable to a company bearing a name different from that of the company of which he is receiver, it is necessary that he should, by proper averments, show that the note is a part of the assets of the company of which he has been appointed receiver. (*Hyatt v. McMahon*, 25 *Barb.* 457.) If the change of name was by a reorganization of the company under the general act, a general averment of the fact of reorganization is enough.

18. Setting aside Assignment.—Where a receiver brings an action to set aside an assignment, he must state in his complaint the equity of the party whose rights he represents, to maintain the action which he attempts to prosecute. A receiver in general is not clothed with any right to maintain an action which the parties or the estate which he represents could not maintain. (*Coope v. Bowles*, 42 *Barb.* 87; *S.C.*, 18 *Abb. Pr.* 442; and 28 *How. Pr.* 10.) And he must show a cause of action existing in those parties. *Id.*

19. Sufficient Averment.—Alleging that plaintiff is receiver of, etc., appointed by the Supreme Court by an order made on a specified day, on condition of filing security, and that such security was given accordingly, states enough to enable the defendant to take issue upon the legality of the plaintiff's appointment. *Stewart v. Beebe*, 28 *Barb.* 34; compare *Crowell v. Church*, 7 *Abb. Pr.* 205.

20. Transfer to Receiver.—The transfer to a receiver by order of court of the effects of an insolvent in the suit of a judgment-creditor, is not an assignment absolutely void under the Insolvent Act of 1852, according to any decision of the Supreme Court, but only void against the claim of creditors. (*Naglee v. Lyman*, 14 *Cal.* 450.) Where it appears that the partners, parties to the suit for a dissolution, held a judgment against a third party which was never reduced to the possession nor under the control of the receiver, the appointment of the receiver would not operate as an assignment or transfer of any property not so reduced to possession within a reasonable time. *Adams v. Haskell*, 6 *Cal.* 475.

21. Vacating Order of Appointment.—The pendency of a motion for a new trial does not operate as a stay of proceedings, so as to deprive the Court of the power of vacating an order appointing a receiver made before the trial. *Copper Hill Min. Co. v. Spencer*, 25 *Cal.* 15.

No. 80.

ii. The Same—Appointed in Supplementary Proceedings.

[TITLE.]

The plaintiff, as receiver of the property of C. D., complains, and alleges:

I. [*State cause of action.*]

II. That on the day of, 187., at, upon an application made by L. M., a judgment-creditor of said C. D., in proceedings supplementary to execution, and by an order or determination then duly made by the Hon. G. H., Judge of the Dis-

trict Court of the Judicial District of the State of California, the plaintiff was appointed receiver of the property of said C. D.

III. That thereafter, and before the commencement of this action, he gave his bond required by said order, etc. [*as in preceding form.*]

[*Demand of Judgment.*]

22. Fund in Hands of Trustees.—A complaint by a receiver, appointed in supplementary proceedings, alleged that a fund was given by will to the defendants as trustees, in trust, to keep the same invested, and pay the interest to the execution-debtor during his life; that the defendants had collected interest since the appointment of the plaintiff as receiver, but refused to pay the same over to the plaintiff. *It did not aver* that any part of the interest was in the hands of the defendants, as a surplus above what was necessary for the debtor's support. *Held*, that the complaint did not state facts sufficient to constitute a cause of action. (*Graff v. Bonnett*, 31 *N.F.* 9.) The interest of the debtor in the income of the fund under such a trust, is only subject to the claims of creditors to the extent of a surplus over and above what is necessary or proper for his maintenance and support. The Court cannot infer that such a surplus exists. It is the duty of the pleader to show by proper averments that such facts exist. *Graff v. Bonnett*, 31 *N.F.* 9.

23. Supplementary Proceedings.—In proceedings supplementary to execution, the Court may appoint a receiver when it has all the parties before it. *Hathaway v. Brady*, 26 *Cal.* 586.

No. 81.

iii. *Another Form—Setting out Proceedings at Length.*

[TITLE.]

The plaintiff, as receiver of the property of C. D., complains, and alleges:

I. That E. F. and G. H., of San Francisco, State of

California, survivors of C. D., deceased, in an action brought by them in the District Court of the Judicial District of this State, against J. K., obtained judgment against the defendant in that action, on, etc., for the sum of, etc., which judgment was entered by the Clerk of the County of, on the day aforesaid, and the roll filed and judgment docketed in said Clerk's Office on that day.

II. That on, etc., an execution therefor was duly issued by plaintiff's attorney to, and delivered to the Sheriff of said County of, commanding him to make said, etc., with interest from, etc., and make return of his doings in the premises; that said Sheriff afterwards, and on, etc., returned said execution to the Office of the Clerk of the County of, with his return thereon indorsed, showing the execution wholly unsatisfied.

III. That afterwards, and on, etc., the plaintiff in said action caused an affidavit to be made, setting forth the above facts, as to obtaining said judgment, the filing of transcript, the issuing and return of said execution, and that the said judgment remained wholly unsatisfied, and presented the same to Hon. J. D., Judge of the District Court of the Judicial District, on the same day, who thereupon, and on, etc., made an order requiring said judgment-debtor to appear before L. M., Esq., referee thereby appointed, at the office of the said L. M., in, etc., on, etc., at . . . o'clock in the . . . noon, to testify concerning his property; and said N. O., by said order was further forbidden to transfer, or in any manner dispose of, or interfere with any property, moneys, or things in action belonging to him until further order in the premises.

IV. That said order was personally served on said defendant on the same day, and said defendant appeared before said referee at the time and place in said order specified, and severally submitted to an examination under oath, and testified as to his property ; which examination was on the same day, by said referee, certified to said Judge, who thereupon, by an order, appointed A. B., of, etc., this plaintiff, receiver of all the debts, property, effects, equitable interests, and things in action of said C. D., and further ordered that this plaintiff, before entering upon the execution of his trust, execute to the Clerk of this Court a bond, with sufficient sureties, to be by said Judge approved, in the penal sum of, conditioned for the faithful performance and discharge of the duties of such trust, and that this plaintiff upon filing such bond in the Office of the Clerk of the County of, be invested with all rights and powers as receiver according to law. Said C. D. was therein and thereby enjoined and restrained from making any disposition of, or interfering with his property, equitable interests, things in action, or any of them, except in obedience to said order, until further order in the premises.

V. That on, etc., he executed a bond with sureties, as required by said order and the rules and practice of this Court, which was approved by said Judge, and filed in the Office of the Clerk of the County of, etc.

VI. [*Allege cause of action.*]

[*Demand of Judgment.*]

24. Form.—The above form is substantially from "McCall's Forms," 270. See *Cal. Pr. Act*, § 143, Subd. 3; *N.Y. Code*, § 244, Subd. 5.

*No. 82.**iv. By Receiver of Dissolved Corporation.*

[TITLE.]

The plaintiff, as receiver of the Company, complains, and alleges:

I. [*State a cause of action accruing to the corporation.*]

II. That on the day of, 187., at, upon an application made upon occasion of the insolvency of the said Company [*or state any other reason which may exist*], and by an order of the Hon., Judge of the District Court of the Judicial District, State of California, the plaintiff was appointed receiver of the property, and effects, and things in action of the said Company, pursuant to statute.

III. [*Allege qualification as in Form No. 79.*]

[*Demand of Judgment.*]

25. Occasion of Dissolution.—The occasion of the dissolution should be shown. *Gillet v. Fairchild*, 4 *Den.* 80; see *Tuckerman v. Brown*, 11 *Abb. Pr.* 389.

No. 83.

By Receiver of Mutual Insurance Company on Premium Note.

[TITLE.]

The plaintiff, as receiver of the Company, complains, and alleges:

I. That the Insurance Company was at the time hereinafter mentioned, a mutual insurance company, duly incorporated as such under and by virtue of an act of the Legislature of this State, entitled [*title of act*], and was duly organized under said Act, to make, etc. [*State object of incorporation.*]

II. That on the day of, 187., at the general term of the District Court, of the Judicial District, in and for the County of, State of California, this plaintiff was appointed receiver of the stock, property, things in action, and effects of the said Company [upon the occasion of its voluntary dissolution, or otherwise].

III. That thereafter, and prior to the day of, 187., the plaintiff gave the requisite security as said receiver, and filed the same in the Clerk's Office of the said County of, and thereupon entered upon the duties of his office as such receiver, and is now, as said receiver, in possession of the stock, property, things in action, and effects of the said corporation.

IV. That the defendant made his certain note in writing, commonly called a premium note; and, at the date in said note mentioned, delivered the said note, of which the following is a copy, to the said Company: [*Copy note*].

V. That said policy of insurance expired in one

year from the date thereof, and said note formed part of the capital stock of said Company, and which said policy of insurance was issued and delivered to the said defendant at the date mentioned in the said note, and thereby the said defendant became a member of said Company, down to and including the time for which said note was assessed by said plaintiff, as said receiver, to pay the losses and liabilities of said Company, incurred whilst said policy and note were in full force and effect.

VI. That after he had entered on the duties as said receiver, he ascertained the amount of the losses by risks, and other liabilities of said Company; and as said receiver, at aforesaid, on the . . . day of, 187., did settle and determine the sums to be paid by the several members of said Company, as their respective portions of such losses and liabilities, in proportion to the unpaid amount of his or their deposit note or notes, agreeably to the charter and by-laws of said Company, and did thereafter on said note assess the sum so settled and determined upon to be paid by the several members of said Company, liable to be assessed therefor.

VII. That after the making of the said assessment, as said receiver, he published notice thereof in the, a newspaper published in the County of, once in each week for days, commencing on the . . . day of, 187., and that previous to the . . . day of, 187., he caused notice to be served on each person assessed, of the amount so settled, determined, and assessed to be paid by him on his premium note, by depositing such notice in the post-office at, directed to each person assessed at his place of residence, as far as such place of residence could be ascertained from the books of said

Company, requiring said assessment to be paid in days after service of such notice.

VIII. That at a special term of the District Court of the Judicial District, held at the Court-House, in the City and County of San Francisco, on the day of, 187., the aforesaid assessment, so made by said receiver on the premium notes of the members of the said Company, was ratified and confirmed, and the said receiver authorized and directed by said Court to bring suits against the several members of said Company, who have refused or neglected to make payment of the amount so assessed by plaintiff to be paid on their respective premium notes.

IX. That the said defendant's note aforesaid was assessed, for the purpose aforesaid, to the amount of dollars, and said assessment was made for losses or damages by risks on life [*or otherwise*] and expenses accrued to said Company only while said note and policy of insurance therein mentioned were in full force and effect.

X. That the defendant has neglected to pay the said assessment.

[*Demand of Judgment.*]

NOTE.—Such a complaint must show the liabilities of the company. *Thomas v. Phalon*, 31 *Barb.* 172.

COMPLAINTS—SUBDIVISION SECOND.

In Actions for Debt.

CHAPTER I.

ACCOUNTS.

No. 84.

i. For Money Due on an Account.

[TITLE.]

The plaintiff complains, and alleges :

I. That the defendant is indebted to the plaintiff in the sum of dollars upon an account for [goods sold, money lent, *or otherwise*], at, between the day of, 187., and the day of, 187..

II. That he has not paid the same.

[*Demand of Judgment.*]

1. Due.—That defendant is indebted to plaintiff in the sum, etc., for goods sold and delivered on, etc., and that there was then due to the plaintiff from the defendant said sum, implies a contract, a promise to pay, and that the period when the same was promised to be paid had expired, and constitutes a good *indebitatus* count in debt. (1 *Chitt Pl.* 345; 2 *Chitt. Pl.* 142; *Emery v. Fell*, 2 *Term.* 28; *Allen v. Patterson*, 7 *N.Y.* 479.) See, also, (*Hughes v. Woosley*, 15 *Mo.* 492,) as to form of complaint on an account.

2. Guardian and Ward.—A ward on coming of age may maintain an action of account against his guardian. *Co. Litt.* 89; 2 *Kenl's Com.* 188; *Bertine v. Varian*, 1 *Edw.* 343.

3. Items of Account.—It is not necessary to set forth the items of an account in a pleading. *Cal. Pr. Act*, § 56; *N.Y. Code*, § 158.

4. Joint Adventure.—A bill for an account is the proper remedy for the settlement of the proceeds of a joint adventure, where, in consideration of an outfit and advances made by plaintiff, the defendant agreed to account for and pay over a proportion of the proceeds of his labor and speculations of every kind for a certain period of time, although the parties may not have been technically partners. (*Garr v. Redman*, 6 *Cal.* 574. Nor is it a misjoinder of causes of action to demand in the same action, that defendant account for and refund a proportion of the outfit and advances made by plaintiff, as agreed in the same contract. *Id.*

5. Many Items of Account.—In an action to recover many items of demand claimed by one and the same right, the items may be, for the sake of brevity and convenience, thrown into one count. (*Longworthy v. Knapp*, 4 *Abb. Pr.* 115.) If the action be in fact for an accounting, it may be treated as one cause of action of an equitable nature, and stated accordingly. *Adams v. Holley*, 12 *How. Pr.* 326.

6. Mutual Accounts.—Where one party is selling to the other party goods from time to time, and charging the same, and the other gives him money which he credits on the account as payment, the credit does not make the account mutual within the Statute of Limitations. (*Adams v. Patterson*, 35 *Cal.* 122.) But where the defendants delivered to the plaintiffs an article of personal property, for which the latter gave the former credit at a specified valuation, a mutual account was created. (*Norton v. Larco*, 30 *Cal.* 132.) In Nevada, it was decided that such a credit would not constitute a mutual account consisting of reciprocal demands, but it would create a mutual account if delivered without any understanding that it should be applied as payment. *Warren v. Sweeney*, 4 *Nev. Rep.* 101.

7. Mutual Accounts—Set off.—Mutual accounts are made up of matters of set off, where there is an existing debt on the one side

and a credit on the other; or where there is an understanding, express or implied, that mutual debts shall be satisfied or set off, *pro tanto*. (Norton v. Larco, 30 Cal. 126.) A payment made on an account, and not intended as a set off *pro tanto*, does not make a mutual account. (Norton v. Larco, 30 Cal. 132.) Striking a balance converts the set off into a payment. (Norton v. Larco, 30 Cal. 132.) And until such balance is struck, a mutual account exists. *Id.*

8. Mutual, Open, and Current Accounts.—A “mutual, open, and current account, where there have been reciprocal demands,” within the meaning of Section 17 of the Statute of Limitations, is one consisting of demands upon which each party respectively might maintain an action. (Warren v. Sweeney, 4 Nev. Rep. 101.) If all the items on one side of an account were intended by the parties as payments or credits on account, it is not a mutual, open, and current account where there are reciprocal demands. Warren v. Sweeney, 4 Nev. Rep. 101.

9. Partners.—An action of account at law may be brought by one partner against another. (Co. Litt. 171; 1 Montag. on P. 45; Duncan v. Lyon, 3 Johns. Ch. 351; Atwater v. Fowler, 1 Edw. 417; Ogden v. Astor, 4 Sandf. 313.) In any business, see 18 Pick. 299; overruling dicta in McMurray v. Rawson, 3 Hill, 59; see, also, Kelly v. Kelly, 3 Barb. 419.

10. When Action Lies.—The action of account lies between merchants, between whom there is a privity. (2 Greenl. Ev. 35; 1 Com. Dig. Ac. A. B.) Against an attorney for money received from his client. (4 Watts, 420; 3 Chitt. 383.) By a *cestui que trust*, against trustee appointed by will for an account. (2 Watts, 95.) By receiver against his deputy. (1 Roll. 118-120; 1 Com. Dig. 191.) So, by a sheriff against his deputy. (*Id.*) Against a receiver appointed to receive rents and debts of another. 1 Com. Dig. 190; 1 Roll. 116; 6 Mod. 92.

*No. 85.*ii. *By an Assignee on an Account.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at the City of, the defendant was indebted to one E. F. in the sum of dollars, on an account for money lent by said E. F. to said defendant, and for money paid, laid out and expended by said E. F., to and for the use of said defendant, and at his request.

II. That thereafter said E. F. assigned said indebtedness to this plaintiff, of which the defendant had due notice.

III. That the defendant has not paid the same.

[*Demand of Judgment.*]

11. Assignment.—An account may be assigned. The right of its assignment existed before the passage of the Practice Act. *Ryan v. Maddux*, 6 Cal. 247. See "*Parties*," p. 67, Note. 49.

*No. 86.*iii. *On an Account Stated.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, an account was stated between the plaintiff and the defendant, and upon such statement a balance

of dollars was found due to the plaintiff from the defendant.

II. That the defendant agreed to pay to the plaintiff the said balance of dollars.

III. That he has not paid the same.

[*Demand of Judgment.*]

12. Account Stated.—The mere rendering of an account does not make a stated one. Yet if it is received, its correctness admitted, balance claimed, or offer made to pay, it becomes a stated account. (*Toland v. Sprague*, 12 *Pet.* 300.) An account in writing, showing a balance, or that there is none, does not require a signature to make it a stated account. (*Baker v. Biddle*, *Baldw.* 394.) And it is not affected by its balance being introduced into a subsequent account. *Id.*

13. Acquiescence in Account.—The complaint must show a demand in favor of the plaintiff acceded to by the defendant. (*Terry v. Sickles*, 13 *Cal.* 427.) Where a party receives an account and keeps it for a reasonable time without objecting to it, he will be considered as acquiescing in it, and it will have the force of an account stated. (*Towsley v. Denison*, 45 *Barb.* 490.) But where a merchant sends an account current to another residing in a different country, and he keeps it through two years without making an objection, it becomes an account stated. (*Freeland v. Herron*, 7 *Cranch.* 147.) *Long acquiescence* makes an account, an account stated. 1 *Story Eq. Jur.* § 526 2 *Alk.* 251; 2 *Vern.* 276; 2 *Ves.* 239; 6 *Ala.* 518; 4 *Paige*, 481; 1 *J. & W.* 29; 2 *Id.* 152; 2 *Sch. & L.* 267; 2 *B. C.* 62; 2 *Johns. Ch.* 437; 3 *Id.* 586; *Baldw.* 418; *Id.* 544; 3 *Mas.* 161; 11 *N.Y.* 170; 2 *Barb.* 586; *Seld. No. December*, 1852; 1 *N.Y. Leg. Obs.* 359; 1 *Edw.* 417; 2 *Id.* 1; 10 *Barb.* 213; 3 *Johns. Ch.* 569.

14. Audited and Approved.—Where accounts bear upon their face “audited and approved,” and “certified to be correct,” they become instruments of writing within the meaning of the statute. *San-nickson v. Brown*, 5 *Cal.* 57.

15. Averment.—An averment that one party made a statement of an account and delivered it to the other, who made no objection to

it, is not an averment that an account was stated between them. At most, these are matters of evidence, tending to show, but not conclusively, an account stated. (*Emery v. Pease*, 20 *N.F.* 62; *Lockwood v. Thorne*, 8 *Id.* 285.) Where, after the death of one partner, an account is stated between defendant and the co-partnership, admitting a balance due by him for goods sold in the lifetime of the deceased, the surviving partner may recover without averring the death of the other partner, and the survivorship. *Holmes v. De Camp*, 1 *Johns.* 34.

16. Corporations.—The rule in matters of account is applicable to a private corporate body, engaged in trade, and conducting its affairs by officers and agents. *Bradley v. Richardson*, 2 *Blatchf.* 343.

17. Erasure.—An erasure in a settled account, not shown to have been made before its settlement, is sufficient to avoid it. (*Prevost v. Gratz*, *Pet. C. Ct.* 364.) The presumption is that the alteration was made after execution. *Id.*; but compare *Malarin v. United States*, 1 *Wall.* *U.S.* 282.

18. "Errors Excepted."—An account in writing, examined and signed, will be deemed a stated account, notwithstanding it contains the phrase, "Errors excepted." (*Branger v. Chevalier*, 9 *Cal.* 353; *Troup v. Haight*, *Hopk.* 239.) Accounts stated may be opened, and the whole account taken *de novo*, for gross mistake in some cases; but only when the error affects all the items of the transaction. (*Branger v. Chevalier*, 9 *Cal.* 353; *Hager v. Thomson*, 1 *Black.* 80.) And when a party goes into particulars, he is confined to those items improperly charged, and the remainder of the account must stand. *Branger v. Chevalier*, 9 *Cal.* 353; *Perkins v. Hart*, 11 *Wheat.* 237.

19. Form.—The above form is from (*Graham v. Cammon*, 13 *How. Pr.* 361.) A complaint stating that whereas said defendant was justly indebted to plaintiffs in the sum of three thousand dollars, for money paid, laid out, and expended for the use and benefit of said defendant, and at his special instance and request, to wit: at, etc., and on the first day of April, 1857, and in the sum of three thousand dollars, for money found to be due from the defendant to plaintiffs on an account then stated between them; and the said defendant being so indebted to the plaintiffs, afterwards, to wit, on the day and year aforesaid, at the place aforesaid, undertook and faithfully promised the plaintiffs to pay the same, etc., and that said sum is due and unpaid, sufficiently states a cause of action. *De Witt v. Porter*, 13 *Cal.* 171.

20. Indebtedness, Allegation of.—A complaint is sufficient which states that defendant was indebted for a certain sum of money, ascertained to be due upon a statement of account, and which defendant promised to pay. (*De Witt v. Porter*, 13 *Cal.* 172.) Where a creditor claims a larger sum to be due him than the debtor admits, but finally yields to the debtor's claim, and takes a promissory note for the lesser amount, he will be bound by the settlement. *Powell v. Jones*, 44 *Barb.* 521.

21. Merchants.—An account between merchant and merchant, closed by cessation of mutual dealings, does not therefore become an account stated. *Mandeville v. Wilson* 5 *Cranch. S. Ct.*, 15.

22. Nature of Claim.—A complaint, although it refers to an account, should indicate the nature and character of the claim, and the period within which it arose. *Farcy v. Lee*, 10 *Abb. Pr.* 143.

23. New Promise.—An account stated alters the nature of the original indebtedness, and has the effect of a new promise. *Carey v. P. and C. Petroleum Co.*, 33 *Cal.* 694; *Holmes v. De Camp*, 1 *Johns.* 34; *Allen v. Stevens*, 1 *N.F. Leg. Obs.* 359.

24. Opening an Account Stated.—The practice of opening accounts stated is not encouraged, and should only be done on clear proof of error or mistake. (*Wilde v. Jenkins*, 4 *Paige*, 481; *Lockwood v. Thorne*, 11 *N.F.* 170.) But fraud is a sufficient ground to open an account stated. (2 *Dan. Ch. Pr.* 764.) The effect of surcharging and falsifying an account, is to leave it an account stated, except so far as it can be impugned. (2 *Nes. Sen.* 565; 11 *Wheat.* 237; *Sto. Eq. Pl.* § 801; 1 *Story's Eq. Jur.* § 523; *Bruen v. Hone*, 2 *Barb.* 586; *Bullock v. Boyd*, 2 *Edw.* 293; *Phillips v. Belden*, 2 *Edw.* 1.) An account cannot be re-opened by one of the parties, without proof of the items, and that some one or more of them ought not to have been allowed. *Stephen v. Cushman*, 35 *Ill.* 186.

25. Overcharge.—If the complaint is verified, and the answer does not charge fraud or mistake, evidence of overcharge is not admissible. *Phillips v. Belden*, 2 *Edw.* 1.

26. Parties.—When an account is settled by the parties themselves, their adjustment is final and conclusive; (*Hager v. Thomson*, 1 *Black*, 80;) even as to the guarantor. (*Bullock v. Boyd*, 2 *Edw.* 293.)

It is not at all important that the account be made out by the one party against the other. When a consignor rendered an account to the consignee, it was a stated account from the time that the consignor demanded payment of the balance. (*Toland v. Sprague*, 12 *Pet.* 300.) So, where the agent presented the account. 2 *Atk.* 251; 2 *Ves.* 239; *Murray v. Toland*, 3 *Johns. Ch.* 569.

27. Presumption.—When an account between parties is stated, with debit and credit sides, and the matter in controversy is stated therein, the presumption of law is that the account is correct, unless it is shown that fraud, omission, or mistake exists. (*Carroll v. Paul*, 16 *Mo.* 226.) An account against the State, certified by the Auditor, is conclusive on him only as to the correctness of the statements therein contained. *State v. Hinkson*, 7 *Mo.* 353.

28. Running Accounts.—In suits on a running account, the whole should be included in a single action. (*Guernsey v. Carver*, 8 *Wend.* 492; *Bonsay v. Wordsworth*, 36 *Eng. Land Eq. R.* 283; 18 *C. B.* 325; *Wood v. Perry*, 3 *Exch. R.* 442.) Various items of an account, though accrued at different times, may be united. *Dows v. Hotchkiss*, 10 *N.Y. Leg. Obs.* 281; *Adams v. Holley*, 12 *How. Pr.* 326.

29. Separate Accounts.—As to when separate accounts between the same parties are separate causes of action, and therefore must be separately stated, see *Phillips v. Berick*, 16 *Johns.* 136; *Stevens v. Lockwood*, 13 *Wend.* 644; *Staples v. Goodrich*, 21 *Barb.* 317; and *Longworthy v. Knapp*, 4 *Abb. Pr.* 115.

No. 87.

iv. For a General Balance of Account.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of dollars, for the balance of an account for groceries sold and delivered by the plaintiff to defendant, and for services performed by the plaintiff

for the defendant as an accountant, and for commissions of plaintiff on the sale for defendant of various articles of farm produce, and for moneys paid by plaintiff for defendant's use; the whole furnished, done and performed at the request of the defendant between the day of, 187., and the day of, 187.. That the whole amount and aggregate value of which items is dollars, no part of which has been paid, except the sum of dollars, the balance of account first aforesaid still being unpaid.

II. That the defendant has not paid the same.

[*Demand of Judgment.*]

No. 88.

v. *Upon an Account for Services.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of dollars on an account for the work, labor, and services in [*state the servite*] performed at the request of the defendant at, between the day of, 187., and day of, 187..

II. That he has not paid the same.

[*Demand of Judgment.*]

30. Account Stated.—An account stated for services bars the employer from setting up a claim for boarding employee. *Martin v. Acker, Blatchf. & H.* 279.

31. Form.—This form is sustained by *Moffet v. Sackett*, 18 *N.F.* 522.

32. Services.—A petition (complaint) on an account for services rendered a third person charging an original liability is sufficient. *Wing v. Campbell*, 15 *Mo.* 275.

33. Time.—In order to be sufficiently definite and certain, the complaint should show the nature and character of the claim, and the period within which it arose. *Farcy v. Lee*, 10 *Abbotts' Pr.* 143.

No. 88.

vi. *The Same, by an Architect.*

[TITLE.]

The plaintiff complains, and alleges :

I. That the defendant is indebted to the plaintiff in the sum of dollars, on an account for work, labor, and services, as architect in forming and drawing plans, and making estimates for, and superintending the erection of a row of buildings to be known as Cottage Row, in Street, in the City and County of San Francisco, performed at the request of the defendant between the day of, 187., and the day of, 187..

II. That the defendant has not paid the same.

[*Demand of Judgment.*]

*No. 90.*vii. *The Same, by a Broker for Commissions.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of dollars, on an account for services as broker, in the purchase [and sale] of [government bonds, state stock, negotiable securities, real estate, personal property, *or otherwise*], performed at the request of the defendant, at the City and County of San Francisco, between the day of, 187., and the day of, 187..

II. That the defendant has not paid the same.

[*Demand of Judgment.*]

*No. 91.*viii. *By Carrier, against Consignor, for Freight.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff to the amount of dollars, on an account for work, labor, and services, in carrying in their vessel, the, sundry goods and merchandise, from, to, at the request of the defendant,

between the day of, 187., and the day of, 187..

II. That the defendant has not paid the same.

[*Demand of Judgment.*]

No. 92.

ix. *The Same, against Consignee.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff to the amount of dollars, on an account for work, labor, and services, in carrying in their vessel, the, sundry goods and merchandise, from, to, which were consigned to the defendant and delivered by plaintiff at to the defendant and by him accepted, between the day of, 187., and the day of, 187..

II. That the defendant has not paid the same.

[*Demand of Judgment.*]

34. Interest.—Freight does not bear interest till after demand. *Schureman v. Withers, Anth. N.P. 230.*

No. 93.

x. *By Editor, for Services.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in

the sum of dollars, on an account for services as an editor in conducting the newspaper of the defendants known as "The," and in writing and preparing articles and paragraphs for the same, performed at the request of the defendant, at the City and County of San Francisco, between the day of, 187., and the day of, 187..

II. That the defendant has not paid the same.

[*Demand of Judgment.*]

35. Contributor's Services.—The furnishing of articles for publication at the request of the publisher is not of itself a service for which a promise to pay will be implied. See authorities under the next form.

No. 94.

xi. *Allegation for Editing and Compiling a Book.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of dollars, on an account for work, labor, and services, in compiling and editing a certain book, entitled "The," and in preparing the same for the press, and revising and correcting the proofs of the same, performed at the request of the defendant, at the City and County of San Francisco, between the day of, 187., and the day of, 187..

II. That the defendant has not paid the same.

[*Demand of Judgment.*]

36. Author's Services.—A stronger case is required to raise an implied promise on the part of the publisher to pay for the services of the author, than in the case of other services. See, as to the rights of the author without copyright, in (*Donaldsons v. Becket*, 17 *Parl. Hist.* 990; judgment reported in 4 *Burr.* 2,408; *Thurlow arg.* in *Tonson v. Collins*, 1 *W. Blackst.* 306; *Yates arg.*, *Id.* 333 (this case was never decided); *Beckford v. Hood*, 7 *T. R.* 620; and see 627; *Chappell v. Birdy*, 14 *Mees. & W.* 303; *Jeffreys v. Boosey*, 30 *Eng. L. & E. R.* 1; *Wheaton v. Peters*, 8 *Pet.* 591; *S.C.*, 11 *Curtis' Decis.* 223.) We cannot, however, see any *reason* why a stronger case is required to raise an implied promise to pay on the part of publishers, for services rendered them, than for any other class of persons.

No. 95.

xii. *For Services and Materials Furnished.*

[TITLE.]

The plaintiff complains, and alleges :

I. That the defendant is indebted to the plaintiff in the sum of dollars, on an account for work, labor and services of the plaintiff, performed at the request of the defendant, in [*insert nature of work*], and for materials furnished by the plaintiff in and about the said work, on the like request, between the day of, 187., and the day of, 187., at the City and County of San Francisco.

II. That he has not paid the same.

[*Demand of Judgment.*]

*No. 96.**xiii. Allegation for Tuition Bills.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of dollars, on an account for the work, labor, and services performed at the request of the defendant, in instructing his children in various useful branches of learning, and for books, papers, and other necessary things furnished by this plaintiff in and about said work, at the like request, and for the board, lodging, and other necessities for said children, provided by the plaintiff during said time, at the like request, between the day of, 187., and the day of, 187., in the sum of dollars.

II. That the defendant has not paid the same.

[*Demand of Judgment.*]

CHAPTER II.

ON AWARDS.

No. 97.

i. On an Award of Arbitrators—Common Form.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant having a controversy between them concerning [a demand of the plaintiff for the price of seventy feet of lumber, which the defendant refused to pay], agreed in writing to submit the same to the award of A. B. and C. D., as arbitrators [*or* entered into an agreement, a copy of which is hereunto annexed].

II. That on the day of, 187., at, the said arbitrators made the award in writing, that the defendant should [pay plaintiff dollars].

III. That defendant has not [paid the same].

[*Demand of Judgment.*]

1. Action.—Arbitration, in pursuance of the Statute of California, settles the controversy; and judgment is entered up by the Clerk, and of course enforced like other judgments. Hence this form can not apply to our practice. In New York, an action may be maintained

upon the award. (*Cope v. Gilbert*, 4 *Den.* 347; *Deidrick v. Richley*, 2 *Hill*, 271; *Hays v. Hays*, 23 *Wend.* 363; *Wells v. Lain*, 15 *Id.* 99.) But a verbal award will not be valid, unless a verbal submission of the matters on which the award is made would be binding upon the parties. *French v. New*, 28 *N.Y.* 147.

2. Appeal.—A stipulation that neither party shall appeal from an award is not binding. *Muldrow v. Norris*, 2 *Cal.* 74.

3. Attorney's Power to Submit.—It is the practice throughout the Union for suits to be referred by consent of counsel, without special authority. *Holker v. Parker*, 7 *Cranch.* 436; *Alexandria Canal Co. v. Swann*, 5 *How. Pr.* 83; and see *Green v. Darling*, 5 *Mass.* 201.

4. Concurrent Acts—Tender.—If the arbitrators award that one of the parties shall pay to the other a certain sum, and also that the parties shall execute to each other mutual releases of all actions, etc., the tender of a release as provided by the award, is not a condition precedent to the right to try an action to recover the money. (*Dudley v. Thomas*, 23 *Cal.* 365.) The award of money is absolute and unconditional, but the award of release is different; they are concurrent acts, and neither party can compel the other to execute a release without the tender of a release by him. (*Id.*; *Cole v. Blunt*, 2 *Bosw.* 11.) But where matters awarded to be done are independent, tender or demand before suit need not be averred. *Nichols v. Rensselaer Co.*, 22 *Wend.* 125.

5. Conditions Precedent.—It was the rule at common law, that the plaintiff need not show the award on both sides, and if there be a condition precedent it need not be alleged. (*McKinstry v. Solomons*, 2 *Johns.* 57; *Diblee v. Best*, 11 *Id.* 103.) But under the Code, performance of the conditions of an award must be pleaded, as well as in the case of a contract. *Cole v. Blunt*, 2 *Bosw.* 116.

6. Conforming to Submissions.—A complaint on an award must show that the arbitrators conformed to the submission, and the powers of the arbitrators. *Gear v. Brocken*, *Burn. (Wis.)* 88; *Mathews v. Mathews*, 2 *Curt. C. Cl.* 105.

7. Delivery.—Where the award was required to be delivered to the parties, alleging that it was ready to be, and was delivered to the plaintiff, it is bad. *Pratt v. Hackett*, 6 *Johns.* 14.

8. Election of Remedy.—Where the submission is by bond, the plaintiff has his election to sue on the bond or on the award, if it is merely for the payment of money; but if a collateral thing is awarded, the suit must be on the bond, as debt will lie for money only. (2 *Saund.* 62.) Where a sum of money is awarded, it is sufficient to set forth only so much of the award as to show a good cause of action. 1 *Lord Raym.* 115; *Burr.* 178.

9. Judgment upon Award.—Judgment may be entered on an award, without an order of the Court. (*Carsley v. Lindsay*, 14 *Cal.* 390.) But the award shall be in writing, signed by the arbitrators or majority of them, and be delivered to the parties. (*Cal. Pr. Act*, § 385.) The Court will not disturb the award, unless the error complained of, whether of law or of fact, appear upon the face of the award. (*Tyson v. Wells*, 2 *Cal.* 122; overruled, as to the report of a referee, in *Cappe v. Brizzalara*, 19 *Cal.* 607.) If a judgment on an award of arbitrators is entered by the Clerk at the request of the party in whose favor it is rendered, within less than five days after the award is filed, and without notice to the other party, the prevailing party cannot afterwards question its validity on the ground that it was irregularly entered. *Hoogs v. Morse*, 31 *Cal.* 128.

10. Jurisdiction.—Where the Court has no jurisdiction of a subject matter, the arbitrators can have none. (*Williams v. Walton*, 9 *Cal.* 142.) And the award being void, the release of the action by one of the parties is also void, if filed in pursuance of the submission. (*Muldrow v. Norris*, 12 *Cal.* 331.) A court of equity may decree specific performance of an award. (*Whitney v. Stone*, 23 *Cal.* 275.) This does not apply to real estate, as no arbitration or award can be made affecting the title to real property in California. Where a party receives the amount of a judgment under an award, it is a waiver on his part of all errors and misconduct on the part of the arbitrators. *Hoogs v. Morse*, 31 *Cal.* 128.

11. Notice.—Notice of the award and demand need not be alleged, unless required by the terms of the submission. (2 *Saund.* 62; *Rowe v. Young*, 2 *Brod. & B.* 233.) This is not, however, the law in California. Here notice must be served on the opposite party before judgment is entered. See § 385, *Practice Act*.

12. Objection to Award.—Where an award is objected to on the ground that it embraces matters not in fact submitted, it lies with

the objecting party to show affirmatively in what the arbitrators have exceeded their duty. *Blair v. Wallace*, 21 *Cal.* 317.

13. Parties.—Any person capable of contracting may submit to arbitration any controversy, except a question of title to real property, in fee, or for life. (*Cal. Pr. Act*, § 380.) This statute is but an affirmation of the common law, and under it the parties have no higher rights than they might have asserted in a court of equity, in cases of fraud, accident, or mistake. *Muldrow v. Norris*, 2 *Cal.* 74; re-affirmed in *Peachy v. Ritchie*, 4 *Cal.* 205.

14. Partners.—One partner cannot bind his co-partner by a submission of partnership matters, but such submission would be good against him. (*Jones v. Bailey*, 5 *Cal.* 345.) Whenever parties may by their non-act transfer real property, or exercise any act of ownership, they may refer disputes concerning it to the decision of arbitrators, as at common law. *Blair v. Wallace*, 21 *Cal.* 317.

15. Power of Arbitrators.—As to the statutory provision, see (*Cal. Pr. Act*, § 383.) The arbitrator must make his award within the time limited in the agreement. (*Ryan v. Dougherty*, 30 *Cal.* 218.) An allegation that an award was made, imports that it was ready to be delivered. (*Munroe v. Allaire*, 2 *Cal.* 320.) They may select an umpire either before or after investigation. (*Dudley v. Thomas*, 23 *Cal.* 365.) And may award costs. (*Id.*) But after an award has been once made and delivered, they cannot amend the same without consent of the parties. (*Id.*) They shall be sworn, and a majority may determine any question. (*Cal. Pr. Act*, § 384.) Arbitrators have no common-law powers when appointed in the mode provided by statute. *Williams v. Walton*, 9 *Cal.* 145.

16. Power to Act.—Where there are three arbitrators, all shall meet, but two of them may do any act which might be done by all. *Cal. Pr. Act*, § 529.

17. Publication.—The arbitrator cannot "award" without "publishing" his award, and "publishing" is a technical phrase merely implying that the arbitrator has finally disposed of the case. (*Brooke v. Mitchell*, 6 *M. & W.* 476.) And when published, any alteration whatever, without consent of the parties, will vitiate it. (*Porter v. Scott*, 7 *Cal.* 312.) Notice of the award need not be averred, unless required by the terms of the submission. (2 *Saund.* 62; 6 *M. & W.* 474.) No

demand need be alleged unless expressly required. *Rowe v. Young*, 2 *Brod. & B.* 233.

13. Revocation.—An agreement to submit a matter to arbitration is, both at law and in equity, revocable before the award is given. (8 *Co. R.* 81; 7 *East.* 607; 1 *Bing.* 89; 5 *Taunt.* 452.) And it cannot be made irrevocable by any agreement of the parties. (*Tobey v. The County of Bristol*, 3 *Story C. Ct.* 800.) Otherwise *it seems*, of a submission by rule of court. (*Masterson v. Kidwell*, 2 *Cranch. C. Ct.* 669.) Where the statute prescribes a particular mode of procedure, it must be followed.

19. Submission.—To constitute a submission to arbitration under the statute, so as to give the award the effect of a judgment, the statute must be pursued in the manner in which the submission is filed with the clerk. (*Heslep v. San Francisco*, 4 *Cal.* 1; *Carsley v. Lindsay*, 14 *Id.* 390.) And the Clerk may enter judgment on the award in due time, without any order of the Court. (See, also, *Ryan v. Dougherty*, 30 *Cal.* 218.) And by the statutes of California, the submission to arbitration shall be in writing, and may be to one or more persons. *Cal. Pr. Act*, § 381.

20. Vacation of Award.—The Court may on motion vacate an award: *First*, Where it was procured by fraud or corruption. *Second*, Where the arbitrators were guilty of misconduct. *Third*, Where the arbitrators exceeded their powers. (*Cal. Pr. Act*, § 386.) Or it may modify or correct an award: *First*, Where there is a miscalculation in figures. *Second*, When part of the award is on matters not submitted. *Third*, When, if it had been the verdict of a jury, it could have been amended, or the imperfection disregarded. (*Cal. Pr. Act*, § 387.) As, where the object of the submission is to make an end of litigation, and the award is uncertain and incomplete upon its face, it defeats the object of the submission and must be set aside. *Pierson v. Norman*, 2 *Cal.* 599.

21. Valid Awards.—The rule is that arbitrators must pass upon all matters submitted. (*Muldrow v. Norris*, 12 *Cal.* 331; *Porter v. Scott*, 7 *Cal.* 312.) It seems that in New York, "that an arbitrator made an award," means a *qualified* arbitrator, and sufficiently imports that he was duly sworn, where an oath is required. (*Browning v. Wheeler*, 24 *Wend.* 258.) An award rendered upon fair arbitration and for a long time concurred in, must be held to be conclusive. (*Jarvis*

v. Fountain Water Co., 5 *Cal.* 179.) No award, implies no valid award. (14 *M. & W.* 822.) An award settles forever all matters fairly within the meaning and intention of the submission. (12 *N.P.* 15; *Lowenstein v. McIntosh*, 37 *Barb.* 251.) An award bad in part, may be enforced for the part that is good, if not attacked for fraud, and the matter is divisible. *Muldrow v. Norris*, 2 *Cal.* 74.

No. 98.

ii. *On an Award of an Umpire.*

[TITLE.]

The plaintiff complains, and alleges:

I. [*Allegation as in Form No. 97.*]

II. That said A. B., before they proceeded upon the said arbitration, on the day of, 187., by writing under their hands, appointed one E. F. to be umpire in the matter so submitted; and the said arbitrators, after hearing the plaintiff and defendant, and not being agreed concerning the matters submitted to them, the said E. F. afterwards undertook said arbitration, and heard the plaintiff and defendant, and on the day of, 187., the said arbitrators made their award in writing, that the defendant should [pay the plaintiff dollars].

III. That he has not paid the same.

[*Demand of Judgment.*]

22. Allegation of an Enlargement of the Time.—That on the day of, 187., the plaintiff and defendant by agreement [in writing, of which a copy is hereto annexed], extended the time for making the award until the day of, 187..

23. Appointment.—An umpire may be appointed by parol, unless the submission require the appointment to be in writing. (El-

mendorf v. Harris, 5 *Wend.* 516; but compare S.C., 23 *Id.* 628.) Where an umpire has been appointed and has entered on the performance of his duty, the authority to decide is vested solely in him; the original powers of the arbitrators cease to exist. *Underhill v. Van Cortlandt*, 2 *Johns. Ch.* 339; *Butler v. Mayor of N.Y.*, 1 *Hill*, 489; *Mayor of N.Y. v. Butler*, 1 *Barb.* 325.

24. Date of Award.—An award may be counted on as made at the time of its date, not at the time as extended by erasure or interlineation. *Tompkins v. Corwin*, 9 *Cow.* 255.

25. Form of Action.—The above form of complaint does not apply under the practice in this State. The report of a referee, and the award of an arbitrator, are in all essentials the same. *Grayson v. Guild*, 4 *Cal.* 122.

26. Power to Award.—But where two arbitrators, unable to agree, appoint under the submission a third arbitrator, the power to make an award is vested in the three jointly. Wherever, therefore, the action is founded on an award, its true character, as the act of an umpire or of arbitrators, must be set forth in the complaint, in order that a defense adapted to its true character may be set up in the answer. *Lyon v. Blossom*, 4 *Duer*, 318.

CHAPTER III.

ON EXPRESS PROMISES.

No. 99.

i. On an Express Promise in Consideration of a Precedent Debt.

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, the defendant then was indebted to the plaintiff in the sum of dollars, for [*state what*]. In consideration thereof, he then promised to pay to the plaintiff the said sum, on the day of

II. That he has not paid the same.

[*Demand of Judgment.*]

27. Consideration.—In every action upon a promise to pay, a consideration must be stated. (*Bailey v. Freeman*, 4 *Johns.* 280.) Such a consideration is an essential fact to be proved, and unless proved the plaintiff cannot recover. (*Gyle v. Shoenbar*, 23 *Cal.* 538.) In an action upon a promise to pay money, if the complaint contains no averment of consideration or of indebtedness, except by way of recital, it is insufficient. *Shafer v. Bear River and Aub. W. and M. Co.*, 4 *Cal.* 295.

28. Consideration, in Purchase of Land.—Defendant, upon the purchase of certain land from B., agreed in writing as part of the consideration, to pay to plaintiff a debt due to him by B. Plaintiff afterward assented, and verbally agreed to look to defendant for the debt. This was not within the Statute of Frauds, and plaintiff may

recover the debt from defendant. (*McLaren v. Hutchinson*, 22 *Cal.* 187.) A promise or agreement to convey lands, in consideration of the purchaser's paying for them out of the profits, is void, as having no consideration. (*Dorsey v. Packwood*, 12 *How. U.S.* 126.) A promise made under mistake, as to liability, is void. *Offut v. Parrott*, 1 *Cranch*, 154.

29. Consideration—Married Woman.—The advance of money to the son of a married woman is not a sufficient consideration for her subsequent promise to repay. *Watson v. Dunlap*, 2 *Cranch*. 14.

30. Consideration to Third Person.—An action can be maintained upon a promise made by the defendant, upon a valid consideration to a third person for the benefit of the plaintiff, although the latter was not privy to the consideration. And a creditor can maintain an action against a person who had received money from his debtor, upon a promise to pay the amount to the creditor. (*Secor v. Lord*, 3 *Keyes*, 525.) Where A., who is indebted to B., promises in consideration of his release by B., to pay the amount to C., who is a party to the arrangement, it is sufficient consideration to support such promise. *Barringer v. Warden*, 12 *Cal.* 311.

No. 100.

ii. *Upon Compromise of an Action.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, an action was pending in the Court, brought by the plaintiff to recover from the defendant the sum of dollars, for goods sold by plaintiff to the defendant.

II. That on the day of, at, in consideration that the plaintiff would discontinue said action, and would accept dollars in

satisfaction of his claim, the defendant promised to pay the plaintiff the sum of dollars.

III. That the defendant accordingly discontinued said action.

IV. That no part of said sum has been paid.

[*Demand of Judgment.*]

31. Claims must be Shown.—A complaint on a promise in consideration of a compromise, should show that there was some shadow of a claim; (*Dolcher v. Fry*, 37 *Barb.* 152;) though it need not show that the plaintiff had a valid claim. *Palmer v. North*, 35 *Id.* 282.

32. Consideration.—An agreement to compromise, not unconscientious or unreasonable, must be executed, without regard to the merits of the dispute. *Sargent v. Larned*, 2 *Curt.* 340.

33. Covenant not to Sue.—A covenant not to sue for five years, is no bar to the action; but the defendant must rely upon the covenant for his remedy. (*Howland v. Marvin*, 5 *Cal.* 501.) A covenant not to sue made to a portion only of joint debtors, does not release any of them. *Matthey v. Gally*, 4 *Cal.* 62.

34. Discontinuance of Action.—It must also aver that the litigation was discontinued according to the compromise. *Dolcher v. Fry*, 37 *Barb.* 152.

No. 101.

iii. *Promise of a Third Person to Pay Money to Plaintiff.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, one A. B. was, and ever since has been, indebted to the plaintiffs in the sum of dollars.

II. That on that day, the said A. B. was the holder of a bill of exchange [*describe it*], and then indorsed and delivered the same to the defendants; in consideration of which the defendants then and there promised A. B. that they would endeavor to collect the same, and that when collected they would apply the proceeds in payment of said indebtedness of said A. B. to the plaintiffs.

III. That afterwards, on the day of, the defendants collected and received the same.

IV. That no part thereof has been paid to the plaintiff.

[*Demand of Judgment.*]

35. Condition Precedent.—On a promise to pay money when collected, collection is a condition precedent, and must be averred. *Dodge v. Coddington*, 3 *Johns.* 146.

36. Form.—This form is supported by (*Delaware and Hudson Canal Co. v. Westchester County Bank*, 4 *Den.* 97.) We have, however, changed it by adding to, and striking out portions. Money received by a third person, on promise to pay creditor's debt, may be recovered. *Goddard v. Mockbee*, 5 *Cranch*, 666.

37. Refusal to Pay.—In an action for a breach of an agreement to pay money to A. for the benefit of B., it is not necessary to aver that the defendants have refused to pay to B., as well as to the plaintiff. *Rowland v. Phalen*, 1 *Bosw.* 43.

38. Vendor of Lands.—Where a person purchased certain lands, and agreed to pay certain debts of the vendor, the subsequent holder of the debts cannot maintain an action for their recovery, not having been privy to the agreement, and there being no novation of the indebtedness and no assent to the transaction which might make the agreement an equitable assignment. (*McLaren v. Hutchinson*, 18 *Cal.* 80.) This doctrine was, however, commented on and questioned in *Lewis v. Covillaud*, 21 *Cal.* 178.

39. When Action Lies.—*Assumpsit* is the proper form of an action against a guarantor, by one who has given credit on the faith of a general promise to be security. The creditor is not confined to an action of deceit. (*Lawrason v. Mason*, 3 *Cranch*, 492.) When A., by agreement between him and B., assented to by C., becomes liable to pay the latter a debt originally due to him from B., the assignee of C. may maintain an action for the debt in his own name against A. (*Lewis v. Covillaud*, 21 *Cal.* 178; *McLaren v. Hutchinson*, 22 *Id.* 187.) Defendant being indebted to E. M. & Co., and they to plaintiff, all parties agreed that defendant should pay the amount of his indebtedness to the Company to plaintiff. This was an equitable assignment, and the only mode of enforcing it is by action in the name of the assignee to recover the debt. *Wiggins v. McDonald*, 18 *Cal.* 126.

No. 102.

iv. *On a Promise to Pay for the Surrender of a Lease.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereafter mentioned, the plaintiff leased from the defendant a house and lot in the town of, for a term commencing on the day of, 187., and ending on the day of, 187., under which he was entitled to the possession of said house and lot.

II. That on the day of, 187., the defendant promised the plaintiff that in consideration that he, the plaintiff, would surrender to the defendant the unexpired term and the possession, he would pay the plaintiff the sum of dollars.

III. That the plaintiff thereupon surrendered the unexpired term of said lease, and the possession of said land, to the defendant.

IV. That no part of said sum has been paid.

[*Demand of Judgment.*]

*No. 103.**v. For the Purchase Money of Lands Conveyed.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff sold and conveyed to the defendant [the house and lot, No. 203 Street, in the City of].

II. That defendant promised to pay the plaintiff dollars for the said [house and lot].

III. That he has not paid the same.

[Demand of Judgment.]

40. Consideration of Deed.—In New York, an action will lie for the consideration of a deed, although there was no valid contract under the Statute of Frauds (*Thomas v. Dickinson*, 12 *N.Y.* 364), even when the deed contains a receipt for the consideration. *Shephard v. Little*, 14 *Johns.* 210; *Thomas v. Dickinson*, 12 *N.Y.* 364.

41. Delivery.—Under a verbal contract of sale of real estate, the delivery of the title deeds is equivalent to a symbolical delivery of and admission into the possession of the property, as between vendor and vendee. *Tohler v. Folsom*, 1 *Cal.* 207.

42. Request is implied by the word "sold." (1 *Saund.* 264, note 1; *Comstock v. Smith*, 7 *Johns.* 87; *Parker v. Crane*, 6 *Wend.* 647.) A failure on the part of the vendee to pay the purchase money for two years and more, does not forfeit his right under the contract, as the vendor may enforce the payment at any time after it is due. *Gouldin v. Buckelew*, 4 *Cal.* 107.

43. Allegation of New Promise.—That thereafter, on the . . . day of . . . , at . . . , in consideration of the foregoing facts, the defendant promised to the plaintiff, in writing, that he would pay such indebtedness.

44. California.—By the practice in California, where a demand barred by the Statute of Limitations or by a discharge in insolvency, is revived by a new promise, the action must be on the original demand, and the new promise is only a waiver of the defense. *Smith v. Richmond*, 19 *Cal.* 476.

45. Conditional New Promise.—When the new promise is coupled with a condition, it should be so alleged and performance must be averred. *Wait v. Morris*, 6 *Wend.* 394.

46. Consideration.—It is well settled with reference to actions for moneys due on contracts, that the statute does not discharge the debt, or in any way extinguish the right or destroy the obligation, but only takes away a remedy. The debt remains unsatisfied and unextinguished. It is a sufficient consideration to support a new promise. *Townsend v. Jemison*, 9 *How. U.S.* 413; *Bulger v. Roche*, 11 *Pick.* 37; *Lincoln v. Battelle*, 6 *Wend.* 485; *Ang. on Limit.*, p. 268, § 213; *Sichel v. Carrillo*, *Cal. Sup. Ct., Apr. T.*, 1869.

47. Election.—Where there is a new promise to pay a continuing debt, although the creditor may sue on the old debt and give the new promise in evidence, he may on the other hand sue on the new promise. (*Lonsdale v. Brown*, 4 *Wash. C. Ct.* 148.) Where a debtor promises to pay when able, and the creditor does not wait, but proceeds immediately on the original obligation before defendant is able to pay, he cannot afterwards resort to an action of *assumpsit* on the new promise. In Iowa, the new promise must be alleged. 12 *Iowa*, 294.

48. Missouri.—Under the Statute of 1845, and in Revision of 1855, the promise or acknowledgement must be in writing, or it is of no effect. *Blackburn v. Jackson*, 26 *Mo.* 308.

49. New York Practice.—By the practice in New York, the complaint may be made on the original demand, and if the Statute of Limitations be pleaded, the new promise may be given in evidence without an allegation. (*Esselstyn v. Weeks*, 12 *N.Y.* 635; *Clark v. Atkinson*, 2 *E. D. Smith*, 112.) And the same rule applies after a discharge in bankruptcy or insolvency. *Shippey v. Henderson*, 14 *Johns.* 178; *Depuy v. Swart*, 3 *Wend.* 135.

50. **Offer.**—An allegation that plaintiff offered, imports a voluntary offer. *Riggs v. Denniston*, 3 *Johns. Cas.* 198; *Holmes v. Lansing*, *Id.* 73.

51. **Ohio.**—In Ohio, the rule seems to be that where a new promise or acknowledgement has been made, the plaintiff may state the demand barred, as a consideration of the new promise, and allege the new promise in writing as the cause of action. *Sturges v. Burton*, 8 *Ohio St.* 215.

52. **Promise in Writing.**—Where a promise to pay a debt is relied on to take a case out of the Statute of Limitations, it is not necessary, in pleading, to allege that it was in writing, signed by the party. *Lynch v. Musgrave*, *Hayes & Jones*, 821.

53. **Request.**—Allegation that plaintiff refused, etc., though then and there particularly requested to do so, is a sufficiently explicit allegation of a request to amount to a positive averment. (*Supervisors of Allegany v. Van Campen*, 3 *Wend.* 48.) Where the agreement is to pay on request the debt of another, if he does not pay at the day, a special request must be averred. The general allegation “though often requested” is not enough. *Bush v. Stevens*, 24 *Wend.* 256.

54. **Statute of Limitations.**—It must be deemed settled by authority, that where there is a new promise to pay a debt barred by the Statute of Limitations, it is not necessary to count upon this as a new contract; but the action may be brought upon the original obligation. *Sands v. St. John*, 23 *How. Pr.* 140.

55. **Time to be Averred.**—The time of such new promise must be definitely averred. An averment of repeated acknowledgments will not suffice. *Bloodgood v. Bruen*, 8 *N.Y.* 362.

CHAPTER IV.

GOODS SOLD AND DELIVERED.

No. 104.

i. Common Form on Account.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant was indebted to the plaintiff in the sum of dollars, on an account for goods, wares, and merchandise, sold and delivered by the plaintiff to the defendant, at his request.

II. That the defendant has not paid the same.

[*Demand of Judgment.*]

1. Amount Due.—The failure to state the amounts due, severally, for goods and for money, would be fatal. *Cordier v. Schloss*, 18 *Cal.* 576.

2. At his Request.—The averment, “at his request,” is not requisite. *Acome v. Amer. Min. Co.*, 11 *How. Pr.* 24; *Glenny v. Hitchins*, 4 *Id.* 98; *Victors v. Davis*, 1 *Dowl. & L.* 986.

3. Cause of Action.—That the defendant is indebted to the plaintiff in a certain sum for goods sold and delivered to him at his request, and that defendant has not paid for the same, states a cause of action. (*Abadie v. Carrillo*, 32 *Cal.* 172.) A complaint alleging that between specified days the plaintiff sold and delivered to defendant, at his special instance and request, a large quantity of boots and shoes

of a specified value, and that there is due and unpaid therefor a sum designated, which he promised to pay, but though often requested by them has wholly refused, is sufficient on demurrer. *Philips v. Bartlett*, 9 *Bosw.* 678.

4. Demand.—Where demand would be necessary if plaintiff sued for damages for conversion, it would be equally necessary where suit is upon the implied contract. *Spoor v. Newell*, 3 *Hill.* 307.

5. Description of Goods.—A party must be presumed to know what was intended by his account, and therefore where a bill of sale is set forth in *hæc verba*, it remedies a defect in the description of the quantity of goods sold. *Cochran v. Goodman*, 3 *Cal.* 244.

6. Implied Promise.—The implied promise to pay is matter of law, and should not be pleaded. *Farron v. Sherwood*, 17 *N.Y.* 227.

7. Indebitatus Assumpsit.—A count in the ordinary form of counts in *indebitatus assumpsit* for goods sold and delivered, is sufficient. *Freeborn v. Glazier*, 10 *Cal.* 337.

8. Insufficient Allegations.—A declaration is insufficient which alleges an indebtedness and sets forth an account, but does not allege the sale or delivery of the articles to the defendant, nor show in what place or what manner the indebtedness accrued, whether on account of the defendant or that of another. *Mershon v. Randall*, 4 *Cal.* 324.

9. Partnership.—In a complaint in an action by several plaintiffs to recover for goods sold and delivered, an allegation of partnership is not necessary, and an allegation of sale and delivery sufficiently implies that the goods belong to the plaintiff. *Phillips v. Bartlett*, 9 *Bosw.* 678.

10. Quantity.—That the plaintiff had purchased a quantity of goods from W. & P., then and there acting as agents of the defendants, is only another form of declaring that he had purchased from the defendant, and is good on demurrer. (*Cochran v. Goodman*, 3 *Cal.* 244.) Where the complaint set forth in *hæc verba* the bill of sale, it was held to remedy a defect in the description of the quantity of goods sold. *Id.*

*No. 105.*ii. *The Same, Short Form.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., [*or between certain dates, naming them,*] the defendant was indebted to the plaintiff in the sum of dollars, on an account for goods sold and delivered by the plaintiff to the defendant at

II. That he has not paid the same.

[*Demand of Judgment.*]

11. Balance of Account for Goods Sold.—The complaint stated a cause of action for goods sold, and, in addition, with a view to meet a probable defense of payment based upon the giving of certain notes by defendant and a receipt in full by plaintiff, stated the making of the notes and receipt, and alleged facts attending the transaction which, if true, avoided its effect as payment, by reason of fraud and misrepresentation on the part of defendant. *Held*, that the allegations of the complaint in reference to the transaction claimed to operate as payment, were not material allegations requiring a denial, and were not therefore admitted by the failure of defendant to deny them. *Canfield v. Tobias*, 21 *Cal.* 349.

12. Form.—This form is supported by *Allen v. Patterson*, 7 *N.Y.* 476; *Tucker v. Rushton*, 2 *Code R.* 59; *Adams v. Holley*, 12 *How. Pr.* 326; *Cudlip v. Whipple*, 4 *Duer*, 610; *Graham v. Camman*, 5 *Duer*, 697; *Dows v. Hotchkiss*, 10 *N.Y. Leg. Obs.* 281; *Chamberlin v. Kaylor*, 2 *E. D. Smith*, 134.

13. Nature of Claim.—The complaint should indicate the nature and character of the claim, and the period within which it arose. *Farcy v. Lee*, 10 *Abb. Pr.* 143.

No. 106.

iii. *For Goods Sold and Delivered at a Fixed Price.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, he sold and delivered to the defendant [fifty casks of sugar, *or other goods, describing them*].

II. That the defendant promised in writing to pay dollars for the said goods, [in gold coin of the United States.]

III. That he has not paid the same.

[*Demand of Judgment.*]

14. Debt, when Due.—It is not necessary to specify any time at which the debt was to be paid. (*Peets v. Bratt*, 6 *Barb.* 662; *Gibbs v. Southam*, 5 *Barn. & Adol.* 911.) A general promise is to be construed as a promise to pay immediately. (*Id.*) And if the promise was to pay at a certain time not yet elapsed, it is matter of defense. (*Smith v. Holmes*, 19 *N.Y.* 271.) But if a day was fixed, it will, if stated, furnish a date for the commencement of interest. *Van Rensselaer v. Jewett*, 2 *N.Y.* 140.

15. Defendant's Request.—An averment of request is not necessary. *Acome v. Amer. Mineral Co.*, 11 *How. Pr.* 27; *Glenny v. Hitchins*, 4 *How. Pr.* 98; *Fisher v. Pyne*, 1 *M. & G.* 266; *Victors v. Davis*, 1 *Dowl. & L.* 986; 12 *M. & W.* 760.

16. Demand.—No demand is necessary. (*Gibbs v. Southam*, 5 *Barn. & Adol.* 911; *Lake Ontario R.R. Co. v. Mason*, 16 *N.Y.* 451.) On an agreement to pay on request, though no request is necessary, a demand is necessary if the promisor be a surety. (*Nelson v. Bostwick*, 5 *Hill.* 37; *Douglass v. Rathbone*, *Id.* 143; *Gibbs v. Southam*, 5 *Barn.*

& *Ad.* 911; *Radford v. Smith*, 3 *M. & W.* 258.) The averment of demand is proper, to fix the time of interest. *Beers v. Reynolds*, 1 *Kern.* 97.

17. Gold Coin.—Where there is a verbal understanding that the price of the goods sold shall be payable in gold coin, it may be enforced if after the debt has accrued and suit has been commenced, one of the firm in the firm name makes a contract in writing to pay in gold coin, said contract dated before the sale of such goods, provided the complaint avers a contract to pay in gold, made before the goods were sold. *Meyer v. Kohn*, 29 *Cal.* 278; see Specific Contract Act, *Cal. Pr. Act*, § 200.

18. Hæc Verba.—When the complaint sets forth in *hæc verba* the bill of the article purchased, it is sufficient to inform the defendant with what he is charged, for he is presumed to know what is intended by his own account. (*Cochran v. Goodman*, 3 *Cal.* 245.) And it was held to remedy a defect in the description of the quantity of goods sold. *Cochran v. Goodman*, 3 *Cal.* 244.

No. 107.

iv. The Same, at a Reasonable Price.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, he sold and delivered to the defendant [*describe the articles*].

II. That the same were reasonably worth dollars.

III. That the defendant has not paid the same.

[*Demand of Judgment.*]

19. Debt Due.—It is not necessary to show that the debt was due before the commencement of the action, nor even at the date of the complaint. *Smith v. Holmes*, 19 *N.Y.* 271.

20. Demand.—No demand is necessary. (See *Gibbs v. Southam*, 5 *Barn. & Adol.* 911; *Radford v. Smith*, 3 *M. & W.* 258.) But upon a state of facts in which a demand would be necessary if the plaintiff sued for damages for conversion, it is equally necessary where he sues upon the implied contract, waiving the tort. *Spoor v. Newell*, 3 *Hill.* 307.

21 Promise.—The promise to pay alleged in the common count in *assumpsit*, was a mere conclusion of law from the facts stated, and need not be averred under the Code, which requires only the facts to be stated. (*Wilkins v. Stedger*, 22 *Cal.* 232.) From the indebtedness admitted the law implies a promise to pay, and the denial of any express promise raises no issue. (*Levinson v. Schwartz*, 22 *Cal.* 229.) The law implies a promise to pay so much as the goods are reasonably worth. This is, however, a matter of law, and should not be pleaded. *Farron v. Sherwood*, 17 *N.Y.* 230.

22. Value, Allegation of.—The allegation of value is material. *Gregory v. Wright*, 11 *Abb. Pr.* 417.

No. 108.

v. The Same, on Specified Price and Credit.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff sold and delivered to the defendant at his request [*describe articles*], for the sum of dollars.

II. That the defendant promised to pay therefor to the plaintiff the said sum of dollars, on or before the day of, 187..

III. That he has not paid the same.

[*Demand of Judgment.*]

23. Demand.—No demand is necessary. Bringing the action is a sufficient demand. (*Lake Ontario R. R. Co. v. Mason*, 16 *N.F.* 451.) On an agreement to pay on request, though no request is necessary if the promisor be the principal debtor, it is necessary if he be surety. *Nelson v. Bostwick*, 5 *Hill*, 37; *Douglass v. Rathbone*, *Id.* 143.

24. Demand, Averment of.—The object of averring a demand is simply to carry interest. It has been held in New York, that where goods are purchased at a price fixed, and without fixing any term of credit, if, after reasonable time elapses, the account is presented, and impliedly admitted, interest is properly chargeable from the time of the demand. *Beers v. Reynolds*, 11 *N.F.* 97; affirming *S.C.*, 12 *Barb.* 288.

No. 109.

vi. *The Same, by Assignee for Price of Stock and Fixtures of Store and Good Will, Payable by Installments.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, one A. B. sold and delivered to the defendant the stock and fixtures of the grocery store, No., in Street, in, the property of said A. B., and bargained, sold, and relinquished to the defendant the good will of the business theretofore carried on there by said A. B.

II. That defendant promised to pay for the same to the said A. B. dollars, in equal monthly installments, payable on the day of each and every month till paid.

III. That he has not paid the same.

IV. [*Allege assignment to plaintiff.*]

[*Demand of Judgment.*]

25. Good Will.—Good will of a trade is the probability that the business will continue in the future as in the past, adding to the profits of the concern, and contributing to the means of meeting its accruing engagements, and is an element to be considered in determining whether at a given date the parties conducting the business were solvent. It is part of the partnership property, and adds to the value of property and stock, and will accompany the sale. (*Bell v. Ellis*, 33 Cal. 620.) Plaintiff having bought certain horses of defendant, as also the “good will” of a mercantile house in the matter of drayage, cannot sue to recover back the purchase money on the ground that such “good will” is not vendable. *Buckingham v. Waters*, 14 Cal. 146.

No. 110.

vii. *The Same, by a Firm in which there is a Dormant Partner, the Price being Agreed upon.*

[STATE AND COUNTY.]

[COURT.]

A. B., J. H., and J. C. J.,
 Plaintiffs,
against
 JOHN DOE, Defendant.

}

The plaintiffs complain of the defendant, and allege:

I. That the plaintiffs are co-partners in business in the City of San Francisco, under the firm name of B. & H., and that said plaintiff, J. C. J., is a dormant partner in said firm.

II. That on or about the day of, 187., the said plaintiffs, in their firm name, sold and delivered to defendant a certain quantity of merchandise, to wit: dry goods, in the quantities and at and for the prices specified in the bill thereof, hereto annexed, amounting to the sum of dollars.

III. That defendant promised to pay the same at the expiration of four months from the said date of sale.

IV. That said time has elapsed, the said defendant has not paid the same or any part thereof, and said amount is due.

[*Demand of Judgment.*]

26. Partners as Plaintiffs.—A dormant partner is a necessary party plaintiff. See *Secor v. Keller*, 4 *Duer*, 416; compare *Belshaw v. Colie*, 1 *E. D. Smith*, 213; see, further, "*Parties*," pp. 89-90.

No. 111.

viii. *For Goods Delivered to a Third Party at Defendant's Request, at a Fixed Price.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, he sold to the defendant [two hundred bags of coffee], and at the request of the defendant, delivered the same to one A. B.

II. That the defendant promised to pay to the plaintiff dollars therefor.

III. That he has not paid the same.

[*Demand of Judgment.*]

27. Delivery.—When goods sold are delivered to a third person for the exclusive use of such person, the plaintiff, in an action against the purchaser, is bound to aver delivery to the third party in the complaint. It is only as a conclusion of law that such a delivery amounts to the delivery to the purchaser. (*Smith v. Leland*, 2 *Duer*. 497.) But a variance in this respect may be disregarded if the defendant does not appear to have been misled. *Rogers v. Verona*, 1 *Bosw.* 417; *Briggs v. Evans*, 1 *E. D. Smith*, 192.

28. Who Liable.—That person is liable to whom the creditor at the time gave the credit. *Storr v. Scott*, 6 *Carr. & P.* 241; *Chitt. on Cont.* 226; *Story on Agency*, 213, § 263; *Smith's Merc. L.* 212; *Dixon v. Frazee*, 1 *E. D. Smith*, 32; *Briggs v. Evans*, *Id.* 192.

No. 112.

ix. *For Goods Sold, but not Delivered, Price Fixed.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, he sold to the defendant [all the potatoes then growing on his farm in].

II. That defendant promised to pay plaintiff dollars for the same.

III. That he has not paid the same.

[*Demand of Judgment.*]

No. 113.

x. *The Same, at a Reasonable Price.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, he sold to the defendant [all the grapes growing in his vineyard in].

II. That the same were reasonably worth dollars.

III. That defendant has not paid the same.

[*Demand of Judgment.*]

CHAPTER V.

ON GUARANTIES.

No. 114.

i. Against Principal and Sureties on Contract for Work.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, certain articles of agreement were made and entered into between the plaintiff and the defendants, under their respective hands and seals, and bearing date the day of, 187., of which a copy is hereto annexed, marked "Exhibit A."

II. That the plaintiff afterwards duly performed all the conditions of the said contract on his part, and that the same was fully completed on the day of, 187., and that on that day he was entitled to have and receive from the said defendants, upon the said contract, for the said work, mentioned in said agreement, a large sum of money, viz., the sum of dollars.

III. That the said defendants have wholly failed to perform the said contract on their parts.

IV. That they have not paid the same.

[Demand of Judgment.]

[Annex Copy of Agreement, marked "Exhibit A."]

1. **Absolute Guaranty.**—In cases of a clear and absolute guaranty, demand on the principal and notice to the guarantor is not necessary. *Allen v. Rightmere*, 20 *Johns.* 365; *Mann v. Eckford*, 15 *Wend.* 502; *Kemble v. Wallis*, 10 *Id.* 374; *Clark v. Burdett*, 2 *Hall*, 197; *Rushmore v. Miller*, 4 *Edw.* 84; *Van Rensselaer v. Miller*, *Hill & D. Supp.* 237; *McKenzie v. Farrell*, 4 *Bosw.* 192; but, compare *Mechanics' Fire Ins. Co. v. Ogden*, 1 *Wend.* 137.

2. **Conditional Guaranty.**—The liability of a conditional guarantor is commensurate with that of his principal, and he is no more entitled to notice of default, unless the act is beyond his inquiry. (*Douglass v. Howland*, 24 *Wend.* 35.) Where the liability of the guarantor depends upon an action against the principal, it is only necessary to show a suit against the principal. *Morris v. Wadsworth*, 17 *Wend.* 103; *Backus v. Shipherd*, *Id.* 629; but see *Cooke v. Nathan*, 16 *Barb.* 342.

3. **Condition Precedent.**—Where one guaranties the debt of another in consideration of a stay of proceedings against the debtor, the promise of the creditor is a condition precedent, and its performance must be alleged in an action against the guarantor. (*Smith v. Compton*, 6 *Cal.* 24.) Upon a guaranty that the judgment is collectable, proceeding for the collection in due course of law is a condition precedent, and its performance must be shown, or excuse for its non-performance. *Mains v. Haight*, 14 *Barb.* 76.

4. **Consideration.**—A guaranty must be in writing, but the consideration need not be stated. (*Packard v. Richardson*, 17 *Mass.* 122.) And it is confined to the person or persons to whom addressed to give a credit on it. (*Taylor v. Wetmore*, 10 *Ohio*, 490.) A guaranty not under seal nor expressing consideration, made contemporaneously with the contract guarantied, is a part of the contract, and the expression of the consideration in the contract takes the guaranty out of the Statute of Frauds. *Jones v. Post*, 6 *Cal.* 102.

5. **Demand.**—If the guarantor is to pay, in case the principal fails to pay on demand, a demand is necessary, and must be averred and proved. (*Douglass v. Rathbone*, 5 *Hill*, 143; *Bk. of N.Y. v. Livingstone*, 2 *Johns. Cas.* 409; *Nelson v. Bostwick*, 5 *Hill*, 37.) If one guaranties a debt to be collected by himself, demand on the principal debtor need not be shown; otherwise on a demand against one who

merely guaranties a debt where the creditor is to collect. *Milliken v. Byerly*, 6 *How. Pr.* 214.

6. Demand and Notice.—In an action where the plaintiff guarantied that certain certificates of stock should pay ten per cent. per annum, an averment that no dividend was made was insufficient. The undertaking was collateral, and in all such cases a demand and notice must be averred. *Hank v. Crittenden*, 2 *McLean*, 557.

7. General Guaranty.—On general guaranty that debtor will pay, demand on the principal is not necessary to fix the liability of the surety, except for laches of the creditor. (*Clark v. Burdett*, 2 *Hall*. 197; *Union Bank v. Coster*, 3 *Comst.* 203.) So, where demand would be useless, as where principal debtor is an insolvent. *Morris v. Wadsworth*, 11 *Wend.* 100; see, also, *Cooke v. Nathan*, 16 *Barb.* 342.

8. Guaranty on Charter Party.—A guaranty endorsed on a charter party at the same time with its execution, and the consideration of one being in fact the consideration of the other, is good. (*Hazeltine v. Larco*, 7 *Cal.* 32.) The charter party referred to in the guaranty becomes part thereof. But if the guaranty were executed subsequently, it would fail for want of consideration, or of the expression of consideration. *Id.*

9. Joinder of Parties.—In New York, it is held that the principal and sureties who engage by different instruments, although written upon the same paper, should not be joined as parties in one action. (*Allen v. Fosgate*, 11 *How. Pr.* 218; overruling *Enos v. Thomas*, 11 *Id.* 48.) So, a claim against a debtor on a sealed contract, and one against a guarantor by another sealed instrument in the paper, cannot be united (*De Ridder v. Schermerhorn*, 10 *Barb.* 638), as the original liability and the guaranty are separate contracts. (*Brewster v. Silence*, 4 *Seld.* 207; overruling *Enos v. Thomas*, 4 *How. Pr.* 48.) But they may be joined when they engage by one instrument. (*Carman v. Plass*, 23 *N.Y.* 286.) In Iowa, under a similar statute, the contrary is held. *Marion v. Adamson*, 11 *Iowa*, 371.

10. Promise in Writing.—It need not be alleged in the complaint that the promise of the guarantor was in writing. 1 *Chitt. Pl.* 270; *Wakefield v. Greenwood*, 29 *Cal.* 597.

11. Promissory Note.—For action against principal and sureties on promissory note, and against guarantors thereon, see "*Promissory Notes*," Subd., Chap.

12. Request.—Where the guaranty is to pay the debt on request, request should be specifically averred. *Bush v. Stevens*, 24 *Wend.* 256; *Nelson v. Bostwick*, 5 *Hill*, 37; *Douglass v. Rathbone*, *Id.* 143.

No. 115.

ii. *On an Agreement to be Answerable for the Price of Goods Sold.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, in consideration that the plaintiff, at the request of the defendant, would sell to one A.B. on a credit of months, such goods as said A.B. should desire to buy of this plaintiff, the defendant promised to be answerable to the plaintiff for the payment by said A. B. of the price of goods so sold on credit.

II. That the plaintiff afterwards, and on the faith of said guaranty, sold and delivered to said A. B. [*describe the goods sold*], for the sum of dollars, upon a credit of months.

III. That payment of the same was thereafter demanded from said A. B., but the same was not paid.

IV. That notice of such demand and non-payment was given to the defendant.

V. That on the day of, 187., at, payment of the same was demanded by the plaintiff from the defendant.

VI. That the defendant has not paid the same.

[*Demand of Judgment.*]

14. Form of Guaranty.—MR. H., SIR: "You can let D. have what goods he calls for, and I will see that the same are settled for. Yours, truly, H. S. B." — is a continued guaranty. *Hotchkiss v. Barnes*, 34 *Conn.* 27.

15. Growing Fruit.—Where a vendor of shares of fruit, growing in an orchard, guarantied the vendee that he should collect the fruit without disturbance and annoyance, and the vendee was subsequently prevented from gathering all the fruit by third persons, the vendee has a right of action against the vendor on his guaranty, as he was not bound to take a portion of his contract. *Dabovich v. Emeric*, 12 *Cal.* 171.

16. Liability, Limitation of.—Where one guaranties in writing the debt of another for goods sold and delivered, by the guaranty the defendant becomes the debtor of plaintiff, and no limitation could defeat the action, except that prescribed for indebtedness evidenced by the written guaranty. *Whiting v. Clark*, 17 *Cal.* 407.

17. Misjoinder of Causes of Action.—A separate guaranty for goods sold, in connection with an action against purchaser, cannot be united. *Le Roy v. Shaw*, 2 *Duer*, 626; *Spencer v. Wheelock*, 11 *L. O.* 329.

18. Notice.—Where the guaranty relates to a bill of goods, the guarantor must be immediately notified of the acceptance of the guaranty; (*Taylor v. Wetmore*, 10 *Ohio*, 490;) to be given in a reasonable time. (*Mussey v. Raynor*, 22 *Pick.* 223; *Norton v. Eastman*, 4 *Grenl. Rep.* 521; *Tuckerman v. French*, 7 *Id.* 115; *Babcock v. Bryant*, 12 *Pick.* 133; *Beekman v. Hale*, 17 *Johns.* 134; 3 *Cov.* 438; 1 *Mason*, 122.) In some of the states, the guarantor is entitled to notice that his guaranty has been accepted. *Oaks v. Weller*, 13 *W.* 106; *Hawk v. Crittenden*, 2 *McLean*, 557; *How v. Nichols*, 9 *Shipley*, 175; *Hill v. Colvin*, 4 *How. (Miss.)* 231.

19. Notice Limitations.—A delay of three years in giving notice that a guaranty in similar terms has become operative, discharges the guarantor. *Whiting v. Stacy*, 15 *Gray*, 270; see *Parkman v. Brewster*, 34 *Conn.* 271.

*No. 116.**iii. Against Guarantor of Mortgage, to Recover Deficiency after Foreclosure.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the day of, 187., the defendants entered into an agreement with the plaintiff, under their hands and seals, in the words and figures following: [*Copy agreement.*]

II. That the principal sum secured by the note and mortgage referred to in the said agreement, became due and payable on the day of, 187., and that on or about, etc., the plaintiff commenced an action in the District Court of the Judicial District, County of, in this State, for the foreclosure of said mortgage; and such proceedings were thereupon had that on the day of, 187., a decree was made by the said Court, for the foreclosure of the said mortgage and sale of the premises; and that if the proceeds of such sale should be insufficient to pay the amount reported due to the plaintiff, with interest and costs, the amount of such deficiency should be specified in the report of sale therein, and W., one of the defendants therein, should pay the same to the plaintiff.

III. That pursuant to said decree or judgment-order, the premises were duly sold on, etc., by the Sheriff of, etc., for the price or sum of, etc., [and that the plaintiff became the purchaser thereof.]

IV. That, upon said sale, there occurred a deficiency of, etc., as appears by the Sheriff's report of said sale, duly filed in the Office of the Clerk of, etc., and that

thereupon, to wit, on the day of, 187., a judgment was rendered in said Court against W. in favor of the plaintiff, for the said sum of, etc., with interest from, 187., of which no part has been paid.

V. That before the commencement of this action, he demanded of the defendants payment of the amount of such deficiency, and at the same time tendered to them an assignment of said judgment against W., duly executed by the plaintiff, but that the defendants refused to pay the same, and have ever since neglected and refused to pay the same, although the plaintiff has always been, and still is, ready and willing to deliver to said defendants an assignment of said judgment upon being paid the amount due thereon.

[*Demand of Judgment.*]

20. Form.—This form is from “Abbotts’ Forms,” Vol. i, p. 295; and is sustained by (*Goldsmith v. Brown*, 35 *Barb.* 485,) but the recovery is limited by the sum actually paid.

21. Action may be on the Note.—Because a mortgage given to secure the payment of several notes falling due at different times, provides for payment at times or in modes different from the notes, is no objection to suit on the notes at their maturity. The mortgage is no part of the contract of indebtedness. *Robinson v. Smith*, 14 *Cal.* 95.

22. Action by Administrator.—In California, in an action against an administrator to foreclose a mortgage executed by the intestate, no judgment can be entered up for any deficiency which may remain after the application of the proceeds of the sale of the mortgage debt; (*Pichaud v. Riquet*, 21 *Cal.* 76;) thus doing away altogether with the necessity of any action for the deficiency.

23. Covenant in Bond.—For a form of a complaint in an action upon a covenant of guarantee, by which the covenantor becomes surety

for the punctual payment of the bond of other persons, and undertakes that, if default shall be made by them, he will pay and fully satisfy the mortgage mentioned in the bond, see *Farnham v. Mallory*, 5 *Abb. Pr. (N.S.)* 380.

24. Demand of Judgment.—If the sheriff returns the amount due, and the plaintiff has not been fully paid by the sale of the mortgaged property, the Clerk without further order of the Court docket the judgment for the balance due against those defendants named in the judgment as personally liable for the debt, upon which docketed judgment execution may issue. *Leviston v. Swan*, 33 *Cal.* 480.

25. Interest.—Where the assignee of a mortgage agreed to waive his lien in favor of one who had agreed to advance money to replace buildings destroyed by fire, but no agreement at the time was made as to interest, the guaranty of the assignee extended no further than the contract, and as this was silent as to the interest, a higher rate of interest than the law allowed could not be collected. *Godfrey v. Caldwell*, 3 *Cal.* 101.

26. Mortgage as Security.—This form of action would not apply under the statutes of California, and we here append the following notes and authorities as to the practice in this State. It will be seen by the current of authorities that the action must be upon the original indebtedness, and that the mortgage is considered as a mere security. (*McMillan v. Richards*, 9 *Cal.* 365.) A mortgage is therefore a mere security for the debt, and does not pass the fee nor give a right of entry. (*Id.*; *Haffley v. Maier*, 13 *Cal.* 13; *Fogarty v. Sawyer*, 17 *Cal.* 589.) A mortgage in this State, then, does not confer a right to the possession of real property, except as a result of foreclosure and sale. (*Kidd v. Teeple*, 22 *Cal.* 255.) And the vendee of the mortgagor cannot be ousted by a purchaser under the decree of foreclosure and sale, unless such vendee was made a party to the foreclosure suit. *Haffley v. Maier*, 13 *Cal.* 13.

27. Mortgage not a Conveyance.—It shall not be deemed a conveyance, *whatever its terms*, so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale; (*Cal. Pr. Act*, § 260;) restricting the mortgage to the mere purposes of security. (*McMillan v. Richards*, 9 *Cal.* 365; *Goddefroy v. Caldwell*, 2 *Cal.* 489; *Grattan v. Wiggins*, 23 *Cal.* 16; *Dutton v. Warschauer*, 21 *Cal.* 609; *Skinner v. Buck*, 29 *Cal.* 253.)

The words "whatever its terms," do not relate to stipulations for possession or sale. (*Fogarty v. Sawyer*, 17 Cal. 589.) A deed of trust, the trustee not being the creditor, but a third party given to secure a note, and authorizing the trustee to sell the land at public auction, and execute to the purchaser a good and sufficient deed of the same, upon default in paying the note or interest, as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, etc., is not a mortgage requiring judicial foreclosure and sale. *Koch v. Briggs*, 14 Cal. 256.

23. Necessary Averment.—The plaintiffs held certain security on real estate for the payment of an indebtedness of M. to them, but gave up and canceled such security upon B. executing a bond in their favor, the condition of which was that B. should pay to the plaintiffs such amount, not exceeding \$4,000, as should be found due to them from M. after sale of certain goods *and the winding up of the accounts of M. with the plaintiffs*, the payment of which bond was guaranteed by the defendant *under the same conditions expressed therein*. Held, in an action on the defendant's guaranty, that the want of an averment in the complaint of the winding up of the accounts of the plaintiffs with M., or any averment equivalent thereto, rendered the complaint substantially defective, and judgment was given for the defendant on demurrer to the complaint. *Mickle v. Sanchez*, 1 Cal. 200.

No. 117.

iv. On a Guaranty of a Precedent Debt.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, one A. B. was indebted to this plaintiff in the sum of dollars.

II. That on the day of, 187., at, the defendant made and subscribed a memorandum in writing, of which the following is a copy:

[*copy of the guaranty*—and delivered the same to the plaintiff, whereby he promised to the plaintiff to answer to him for said debt.

III. That the plaintiff duly performed all the conditions thereof on his part.

IV. That the defendant has not paid the same.

[*Demand of Judgment.*]

29. Note.—In California, every promise to pay the debt, default, or miscarriage of another must be made in writing. (*Gen. Laws of Cal.* ¶ 3,156.) This is not the rule, however, where the *original* contract is made by the party, although for another's benefit.

No. 118.

v. *Against Sureties for Payment of Rent.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, one W. B. hired from the plaintiff for the term of years the [house No., Street, City of, at the annual rent of dollars, payable monthly].

II. That [at the same time and place,] the defendant agreed, in consideration of the letting of the said premises to the said W. B., to guarantee the payment of the said rent.

III. That the rent aforesaid for the month ending on the day of, 187., amounting to dollars, has not been paid.

[*If by the terms of the agreement notice is required to be given to the surety, add:*] IV. That on the day of, 187., the plaintiff gave notice to the defendant of the non-payment of the said rent, and demanded payment thereof.

V. That he has not paid the same.

[*Demand of Judgment.*]

30. Consideration.—The second count is a sufficient statement of consideration. *Caballero v. Slater*, 14 *C. B.* 303.

31. Leases.—At the time of the execution of a lease from A. to B., C. wrote underneath it: "I hereby agree to pay the rent stipulated above when it shall become due, provided the said B. does not pay the same"—this must be considered as a part of the lease itself, and not within the Statute of Frauds. *Evoy v. Tewksbury*, 5 *Cal.* 285.

CHAPTER VI.

INSURANCE.

No. 119.

i. On Fire Policy—By the Insured.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendants are a corporation duly created by and under the laws of this State [*or* the State of, *etc.*], organized pursuant to an act of the Legislature [of said State] entitled [*title of the act*] passed [*date of passage*] and the acts amending the same.

II. That the plaintiff [was the owner of, *or*] had an interest in a [dwelling house, known as No. 200 Street, in the City of], at the time of its insurance and destruction [*or* injury] by fire as hereinafter mentioned.

III. That on the day of, 187., at, in consideration of the payment by the plaintiff to the defendants of the premium of dollars, the defendants by their agents duly authorized thereto, made their policy of insurance in writing, a copy of which is annexed.

IV. That on the day of, 187., said dwelling-house and furniture were totally destroyed [*or* greatly damaged, and in part destroyed] by fire.

V. That the plaintiff's loss thereby was dollars.

VI. That on the day of, 187., he furnished the defendant with proof of his said loss and interest, and otherwise performed all the conditions of the said policy on his part.

VII. That the defendant has not paid the said loss.

[*Demand of Judgment.*]

[*Annex a Copy of Policy.*]

1. Action by Mortgagor.—In an action by the mortgagor on a policy issued to him, but on terms payable to mortgagee, the complaint must aver "that the mortgage has been paid," or must join the mortgagee as a party. (*Ennis v. Harmony Fire Ins. Co.*, 3 *Bosw.* 516.) Where a policy contained the provision that "if the property" insured "shall be sold," a delivery of the said property to a mortgagee, with the assent of the insurers, does not avoid the policy. (*Washington Insurance Co. v. Hayes*, 17 *Ohio St.* 432.) When a policy is avoided as to removed goods, see *Washington Ins. Co. v. Hayes*, 17 *Ohio St.* 432.

2. Agent.—An agent, to effect an insurance, who retains the policy, has the authority to collect it in case of loss, and the presumption is that he did retain it, especially as he proceeded to collect the money. *De Ro v. Cordes*, 4 *Cal.* 117.

3. Exceptions in Policy.—A provision in a policy of fire insurance exonerating the company from loss by fire which should happen by explosion, must be taken to include an explosion of a steam engine insured by the policy as well as any external explosion. *Hayward v. Liverpool and London Fire and Life Ins. Co.*, 5 *Abb. Pr. (N.S.)* 142.

4. Interest of Insured.—The interest of the insured is one of the facts constituting the cause of action. 2 *Greenl. on Ev.* §§ 376, 378-381.

5. Interest, Averment of.—Alleging that the defendants, in consideration, etc., insured him against loss, etc., on his three story and

attic stone building, etc., and a frame one-story building attached, occupied by the said insured, is a sufficient averment of interest, at least on demurrer. If the averment is too general, the defendant's remedy is by motion. *Fowler v. N.Y. Indemnity Ins. Co.*, 23 *Barb.* 143.

6. Negating Possible Defenses.—It is not necessary to state that the fire was caused by invasion, riot, etc. That is a matter of defense. (*Lounsbury v. Pro. Ins. Co.*, 8 *Conn.* 466; *Rucker v. Green*, 15 *East.* 290; *Hunt v. Huds. Riv. Ins. Co.*, 2 *Duer*, 487; *Catlin v. Springfield Fi. Ins. Co.*, 1 *Sumn.* 439.) The plaintiff is not bound to negative all possible defenses. See above authorities. The remarks in (*Phil. Ins.* (2d. Ed.) 642; *Ellis Ins.* 95) are not sustained by any decision.

7. Pleading the Policy.—Formerly it was customary to set out the policy and conditions annexed at length. The more convenient way is to annex a copy to the complaint, and refer to it. *Fairbanks v. Bloomfield*, 2 *Duer*, 349.

8. Renewal—Allegation where Insurance is.—That on the day of, 187., at, the defendants by their agents duly authorized thereto, in consideration of dollars to them paid by this plaintiff, executed and delivered to this plaintiff their certificate of renewal of said policy, of which the following is a copy annexed, as a part of this complaint.

9. Steamer.—A steamer insured against loss by fire was run into by another vessel, which caused her to fill with water, which forced the fire from her furnaces, and the fire burned so much of her woodwork that she sank, which she would not have done but for the fire. *Held*, that the insurers were liable for the loss except the immediate results of the collision. *Norwich and N.Y. T. Co. v. Western Mass. Ins. Co.*, 34 *Conn.* 561.

No. 120.

ii. *The Same, where Plaintiff Purchased the Property after Insurance.*

[TITLE.]

I. [*Allege incorporation as in last form.*]

II. That [*name of original insurer*] was the owner of, or had an interest in, etc., etc.

III. [*The same as in last form, substituting the names of the original insurers, instead of the words "the plaintiff."*]

IV. That on the day of, 187., at, with the consent of the defendants, in writing, on said policy, by their said agents, the said [*original insured*] sold, assigned, and conveyed to the plaintiff, his interest in the said [property] and in the said policy of insurance. [*Continue as in last form.*]

[*Demand of Judgment.*]

10. Interest.—As to the form of averment of an assignee's interest in the subject insured, see *Granger v. Howard Ins. Co.*, 5 *Wend.* 200.

No. 121.

iii. *Another Form.*

[TITLE.]

The plaintiff complains, and alleges:

I. That he was the owner of a [match factory, and the machinery therein], in the Town of, County of, at the time of its insurance and destruction by fire, as hereinafter mentioned.

II. That on the day of, 187., at, in consideration of the sum of dollars to them paid, the defendants executed to the plaintiff a policy of insurance on the said property, a copy of which is hereto annexed [marked, "Exhibit A"].

III. That on the day of, 187., the said property was totally destroyed by fire.

IV. That the plaintiff's loss thereby amounted to more upon each part of the property separately insured, than the amount of such separate insurance.

V. That on the day of, 187., he furnished the defendant with proof of his said loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

VI. That the defendant has not paid the said loss.

[*Demand of Judgment.*]

[*Annex "Exhibit A."*]

No. 122.

iv. *By Insured, on Agreement to Insure, Policy not Delivered.*

[TITLE.]

The plaintiff complains, and alleges:

I. [*Incorporation of defendants, as in Form No. 119.*]

II. That on and before the day of, 187., the plaintiff applied to A. B., the duly authorized agent of the defendants, for insurance against loss or damage by fire upon a certain stock of merchandise, the property of said plaintiff, consisting of [*describe it*], contained in a building occupied by the plaintiff for [*state what*], in said Town of And the defendants, by their said agent, then and there agreed to become an insurer to said Company on the said stock for three months from that day, for dollars, at a premium of, and that the said defendants would execute and deliver to the plaintiff a policy of insurance in the usual form of policies issued by them,

for the sum of dollars, for the term of three months from the said day.

III. That the plaintiff then and there paid to the defendant said premium, to wit, dollars.

IV. That it was then and there agreed between the plaintiff and the defendants, that the said insurance should be binding on them for the term of three months from the time of the receipt of the said premium, for the sum of dollars; and the said defendants then and there, in consideration of the premises, agreed with the plaintiff, to execute and deliver to him, in a reasonable and convenient time, a policy, in the usual form of policies issued by said Company, insuring the said stock of goods in the sum of dollars against loss and damage by fire, the insurance to commence at the time of the receipt of the said premium, and to continue for the said term of three months.

V. That the defendants, by a policy of insurance issued in their usual form (among other things), did promise and agree [*here set out legal effect of the contemplated policy*].

VI. That after the insurance so made, and after the said promise to execute and deliver a policy in conformity thereto, and within the said term of three months, for which the said plaintiff was so insured, to wit, on the day of, 187., the said stock of merchandise in the said building mentioned and intended to be so insured, was totally destroyed by fire.

VII. That the plaintiff duly fulfilled all the conditions of said agreement and insurance on his part, and that more than days [*or otherwise, as required by the policy*], before the commencement of this action, to wit,

on the day of, 187., at, he gave to the defendants due notice and proof of the loss as aforesaid, and demanded payment of the said sum of dollars.

VIII. That the defendant has not paid the same.

[*Demand of Judgment.*]

11. Assignee.—In an action on a policy of fire insurance, the interest of the assignee must be stated in the complaint to make out a cause of action. (5 *Wend.* 202; *Fowler v. N.Y. Indem. Ins. Co.*, 26 *N.Y.* 422.) A complaint by the assignee of a fire policy averred an insurance of assignor on his building, that the policy was duly assigned with the consent of the insurers, that the plaintiff at the time of the loss was the lawful owner of the policy and of the claim against the insurers by reason of the policy and loss, and he made a demand of payment accompanied with the written assent of the person to whom the original assured had, after the loss, assigned all his property. *Held*, bad on general demurrer, as not showing any interest of the plaintiff or his assignor in the subject insured. *Fowler v. N.Y. Indem. Ins. Co.*, 22 *N.Y.* 422.

12. Assignment.—An assignment of a policy of insurance upon a stock of goods, effected in the name of the assignor, made as collateral security for a debt, with an agreement that in case of loss by fire the assignee shall collect the money and pay the debt, attaches in equity as a lien upon the amount due on the policy to the extent of the debt, as soon as the loss occurs. *Bibend v. L. F. and L. Ins. Co.*, 30 *Cal.* 78.

13. Executory Agreement to Insure.—Of the proper form of action to recover on an executory agreement to issue an insurance policy, see *Post v. Aetna Ins. Co.*, 43 *Barb.* 351.

14. Form.—For a form of complaint, see *Rockwell v. Hartford Fire Ins. Co.*, 4 *Abb. Pr.* 179.

15. Notice.—If the notice alleged states the 24th of May, the plaintiffs were not precluded from showing on the trial that the proper notice was given on the morning of the 21st. *Hovey v. American Mut. Ins. Co.*, 2 *Duer*, 554.

*No. 123.**v. By Executor, on Life Policy.*

[TITLE.]

The plaintiff complains, and alleges:

I. [*Allege incorporation, as in Form No. 119.*]

II. That on the day of, 18.., at, the defendant, in consideration of the [annual, semi-annual, *or otherwise*] payment by one A. B. to it, of dollars, made their policy of insurance in writing, of which a copy is hereto annexed, marked "Exhibit A," and thereby insured the life of said A. B. in the sum of dollars.

III. That on the day of, 187., at, the said A. B. died.

IV. That on the day of, 187., at, said A. B. left a will, by which the plaintiff was appointed the sole executor thereof [*or* this plaintiff and C. D. were appointed executors thereof].

V. That on the day of, 187., said will was duly proved and admitted to probate in the Probate Court of the County of, and letters testamentary thereupon were thereafter issued and granted to the plaintiff, as sole executor [*or otherwise*], by the Probate Court of said County; and this plaintiff thereupon duly qualified as such executor, and entered upon the discharge of the duties of his said office.

IV. That on the day of, 187., the plaintiff furnished the defendant with proof of the death

of the said A. B., and that said A. B. and the plaintiff each duly performed all the conditions of said insurance on their part.

VII. That the defendant has not paid the same, and the said sum is now due thereon from the defendants to the plaintiff, as such executor.

[*Demand of Judgment.*]

16. Conflict of Laws.—A policy of life insurance was made by a New York company, with a condition that it should not become valid until countersigned by their agent at Chicago, and the premium paid, and the condition complied with in Chicago. *Held*, that the law of Illinois as to assignment of the policy prevailed, and that such an assignment by a married woman by way of pledge, was good in equity. *Pomeroy v. Manhattan Li. Ins. Co.*, 40 *Ill.* 398.

17. Construction of Instruments and Statutes.—A policy of insurance on the life of a husband was made payable to the wife, her executors, administrators, or assigns, for her sole use, and in case of her death before his to be paid to her children. A statute authorized a husband to effect such an insurance, and protected it from his creditors. The wife assigned the policy for value, and died before her husband. *Held*, that the policy was payable to the children, not to the assignee, in the event which had happened. *Connecticut Mut. Life Ins. Co. v. Burroughs*, 34 *Conn.* 305.

No. 124.

vi. *By a Wife, Partner or Creditor of the Insured.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, in consideration of the [annual, or otherwise] payment to it of dollars,

executed to the plaintiff a policy of insurance on the life of [her husband] A. B., of which a copy is hereto annexed, and made a part of this complaint, and marked "Exhibit A."

II. That the plaintiff had a valuable interest in the life of the said A. B. at the time of his death, and at the time of effecting the said insurance.

III. That on the day of, 187., at, the said A. B. died.

IV. That on the day of, 187., the plaintiff furnished the defendant with proof of the death of the said A. B., and otherwise performed all the conditions of the said policy on [her] part.

II. That the defendant has not paid the said sum.

[*Demand of Judgment.*]

[*Annex a Copy of Policy, marked "Exhibit A."*]

18. By Wife of Insured.—A wife may insure the life of her husband for any definite period, or for life. *Gen. Laws of Cal.* ¶ 3,586.

No. 125.

vii. *By Assignee in Trust for Wife of Insured.*

[*TITLE.*]

The plaintiff complains, and alleges:

I. [*Allege incorporation as in No. 119.*]

II. [*Same as in Form No. 123.*]

III. That on the day of, 187., the said A. B. [with the written consent of the defendants,

or otherwise, according to the terms of the policy], assigned said policy of insurance to this plaintiff, in trust for E. B. his wife.

IV. That up to the time of the death of A. B., all premiums accrued upon said policy were fully paid.

V. That on the day of, 187., at, said A. B. died.

VI. That said A. B. and the plaintiff, each performed all the conditions of said insurance on their part, and the plaintiff, more than days before the commencement of this action, to wit, on the day of, 187., at, gave to the defendants notice and proof of the death of said A. B. as aforesaid, and demanded payment of the said sum of dollars.

VII. That the defendant has not paid the same.

[*Demand of Judgment.*]

19. Assigned.—That a policy was duly assigned and transferred indicates that the assignment was by a sealed instrument, and a consideration is inferred. *Fowler v. N.Y. Indem Ins. Co.*, 23 *Barb.* 143; *Morange v. Mudge*, 6 *Abb. Pr.* 243.

No. 126.

viii. *Accidental Insurance—Insured against Insurer.*

[TITLE.]

The plaintiff complains, and alleges:

I. That defendant is a corporation, organized under the laws of the State of New York.

II. That on the day of, 187., at

the City of San Francisco and State of California, in consideration of the payment by plaintiff to defendant of a premium of dollars [gold coin], defendant made and delivered to plaintiff its policy of insurance, in writing, upon the life of, of the City and County of San Francisco and State of California, a copy of which is annexed to this complaint, and marked "Exhibit A," and is made part hereof; and thereby insured the life of said, in the sum of dollars [gold coin], against loss of life by personal injury caused by accident, as stated in said policy, for the term of [six] months from and after the day of, 187..

III. That afterwards, to wit, on the day of, 187., for a valuable consideration, the defendant made and delivered to plaintiff its written consent that said might pursue the avocation of supercargo on a sailing vessel during the continuance of the said policy of insurance, without prejudice to said policy, a copy of which consent is hereto annexed as a part of this complaint, and marked "Exhibit B."

IV. That between the day of, 187., and the day of, 187., and as plaintiff is informed and believes and avers, on or about, 187., and while said insurance policy and said written consent were in force, said received a personal injury which caused his death within *three months* thereafter, and that said injury was caused by an accident within the meaning of said policy of insurance, and the conditions and agreements therein contained, to wit: by the destruction and loss of a certain schooner called, while said was on board of her as supercargo, and not otherwise, by a storm at sea

or other perils thereof, while she was on a trading voyage from the port of San Francisco in said State, to the Aleutian Islands in the North Pacific Ocean, and back to said San Francisco, within the meaning of said policy and written consent, and between the said day of, and said day of

V. That plaintiff at the times of making and delivery of said policy and written consent, as aforesaid, was the wife of said, and as such had a valuable interest in his life.

VI. That said and this plaintiff each fulfilled all the conditions and agreements of said policy of insurance on their part, and the plaintiff more than sixty days before the commencement of this action, to wit, on or about the day of, gave to the defendant due notice and proof of the death of said, as aforesaid, and demanded payment of the sum of dollars [gold coin], but no part thereof has been paid.

Wherefore plaintiff prays judgment against defendant for dollars [gold coin], and interest on the same, and costs of suit.

[*Jurat.*]

.....
Atlys for Plaintiff.

No. 127.

ix. Marine Insurance—On an Open Policy.

[*TITLE.*]

The plaintiff complains, and alleges:

I. [*Allege incorporation as in Form 119.*]

II. That the plaintiff was the owner of [*or had an*

interest in] the ship [*name of ship*], at the time of its insurance and loss as hereafter mentioned.

III. That on the day of, 187., at, the defendant, in consideration of dollars to it paid [*or* which the plaintiff then promised to pay], executed to him a policy of insurance upon the said ship, a copy of which is hereto annexed [*or* whereby it promised to pay to the plaintiff, within days after proof of loss and interest, all loss and damage accruing to him by reason of the destruction or injury of the said ship, during its next voyage from to, whether by perils of the sea, or by fire, or by other causes therein mentioned, not exceeding dollars].

IV. That the said vessel, while proceeding on the voyage mentioned in the said policy, was, on the day of, 187., totally lost by the perils of the sea [*or otherwise*].

V. That the plaintiff's loss thereby was dollars.

VI. That on the day of, 187., he furnished the defendant with proof of his loss and interest, and otherwise performed all the conditions of the said policy on his part.

VII. That the defendant has not paid the said loss.

[*Demand of Judgment.*]

[*Annex Copy of Policy.*]

20. Abandonment.—It is not necessary, in an action of covenant on a policy, that the declaration should aver that the plaintiff had abandoned to the underwriters. *Hodgson v. Marine Ins. Co.*, 5 *Cranch*, 100; and see *Columbian Ins. Co. v. Catlett*, 12 *Wheat.* 383.

21. Agent.—Where the agent of an insurance company was fully authorized to make insurance of vessels, and had, in fact, on a previous occasion, insured the same vessel for the same applicant, and in the instance under consideration actually delivered to him, on receipt of the premium note, a policy duly executed by the officers of the company, filled up and countersigned by himself under his general authority, and having every element of a perfect and valid contract, the fact that after the execution and delivery of the policy the party insured signed a memorandum thus: "The insurance on this application to take effect when approved by E. P. D., General Agent," etc., does not make the previous transaction a nullity until approved. (*Ins. Co. v. Webster*, 6 Wall. U.S. 129.) And though the general agent sent back the application, directing the agent who delivered the policy to return to insured his premium note and cancel the policy, the party insured was held entitled to recover for a loss, the agent having neither returned the note nor canceled the policy. *Id.*; *Amer. Law Reg. July*, 1868.

22. Assignee.—The interest of the assignee need not be set out the complaint. 5 *Wend.* 202; *Fowler v. N.Y. Indem. Ins. Co.*, 26 N.Y. 422.

23. Form.—For a sufficient form of complaint, consult *Page v. Fry*, 2 *Bos. & Pul.* 240; *Crawford v. Hunter*, 8 *T. R.* 23.

24. Interest of Insured in Lost Property.—The interest of the insured is one of the facts constituting the cause of action. (2 *Greenl. Ev.*, §§ 376, 378–381.) And the averment that he gave the defendant due proof of loss and of interest, cannot be construed as an averment that the plaintiff had an insurable interest. (*Williams v. Ins. Co. of North America*, 9 *How. Pr.* 365.) It is the safest practice to aver the interest, when it does not distinctly appear in the policy as set forth or annexed. *Phil. on Ins.* 612; *Ellis on Fire Ins.* 175.

25. Interest, how Alleged.—Interest may be more briefly alleged by inserting after the description of the object insured, "then and until the loss hereinafter mentioned, the property of this plaintiff." It need not be averred that the plaintiff was interested at the time of making the policy. In marine insurance, an interest at the commencement of the risk is sufficient; (2 *Greenl. on Ev.* 381; 2 *Phil. on Ins.* 614;) or that the plaintiff was interested in the vessel at the time of the loss, to the extent of the policy. (*Henshaw v. Mutual Safety Ins. Co.*, 2 *Blatchf.* 99.) The nature or extent of the trust upon which the interest was

held need not be set forth, they being matters of evidence. (*Id.*) Where the property is admitted to have been owned by the plaintiff when the policy was issued, the burden of proof is upon the defendants to show a subsequent alienation of the property. *Orrell v. Hampden Ins. Co.*, 13 *Gray*, 431.

26. Mutuality of Agreement.—In an action on an open policy, providing that the company shall be liable for such sums as shall be specified by application, and mutually agreed upon and indorsed upon the policy, it is necessary to aver that an amount sought to be recovered had been mutually agreed upon, and indorsed upon the policy. *Crane v. Evansville Ins. Co.*, 13 *Ind.* 446.

27. Nature of the Loss.—The complaint must show a loss of a nature intended to be covered by the insurance. (*Ellis on Fire Ins.* 176; *Phil. on Ins.* 618.) But not to negative possible defenses. (See *Anle*, Note 6, p. 426.) And the loss of a vessel insured should be deemed effectual and certain, from the time the vessel was so injured that her destruction became inevitable, and the claim for damage must be deemed to have then attached, although she was kept afloat for some time after such injury. *Duncan v. Great Western Ins. Co.*, 5 *Abb. Pr. (N.S.)* 173; *Pardo v. Osgood*, 5 *Rob.* 348; reversing S.C., 2 *Abb. Pr. (N.S.)* 365.

28. Parties.—Those who had an interest in a vessel insured, at the time of the fatal injury, may recover upon the policy, notwithstanding the fact of their having subsequently, and before the sinking of the vessel, made an assignment of their interest to others, who are not parties to the action. (*Duncan v. Great Western Ins. Co.*, 5 *Abb. Pr. (N.S.)* 173.) Where an insurance company, organized under the general law applicable to such companies, being insolvent, distributes its capital among its stockholders, thus placing it beyond the reach of its creditors, it acts in fraud of its creditors, and such fund may be recovered back from those who received it, by a proper action commenced by the proper parties. *Osgood v. Laytin*, 5 *Abb. Pr. (N.S.)* 1.

29. Perils.—The perils specifically mentioned should be such as actually occasioned the loss. It is not necessary to state all the circumstances that produced the peril. *Eldridge v. Long Island R.R. Co.*, 1 *Sandf.* 89.

30. Premium, how Alleged.—The complaint must aver payment, or a liability to pay the premium. 2 *Greenl. Ev.* §§ 376–381; *Phil. on Ins.* 611.

31. Risks.—Capture, though not enumerated, is one of the risks where the enumeration of risks was in the English form, and upon a loss the company was liable. *The Merchants Ins. Co. v. Edmund*, 17 *Grat. (Va.)* 138.

32. Terms.—As to the terms of an insurance policy, whether it be by a marine insurance or by a fire insurance, designated in the usual terms of policies, see *Eureka Ins. Co. v. Robinson*, 56 *Penn. St.* 226; also *American Horse Ins. Co. v. Patterson*, 28 *Ind.* 17.

33. That the Ship Sailed.—The inception of the risk is an essential fact to be proved. 2 *Greenl. Ev.* § 382.

No. 128.

x. On Cargo Lost by Fire—Valued Policy.

[TITLE.]

The plaintiff complains, and alleges:

I. [*Allege incorporation as in Form* 119.]

II. That plaintiff was the owner of [*or* had an interest in] [two hundred barrels of flour], shipped on board the vessel called the A. D., from, to, at the time of the insurance and loss hereafter mentioned.

III. That on the day of, 187., at, the defendant, in consideration of dollars which the plaintiff then paid, executed to him a policy of insurance upon the said goods, a copy of which is hereto annexed, marked "Exhibit A" [*or* whereby it promised to pay to the plaintiff dollars in case of the total loss, by fire or other causes mentioned, of the said goods, before their landing at

.....; or in case of partial damage, such loss as the plaintiff might sustain thereby, provided the same should exceed per centum of the whole value of the goods].

IV. That on the day of, 187., at, while proceeding on the voyage mentioned in the said policy, the said goods were totally destroyed by fire.

V. That the plaintiff's loss thereby was dollars.

VI. That on the day of, 187., he furnished the defendant with proof of his loss and interest, and otherwise performed all the conditions of the said policy on his part.

VII. That the defendant has not paid the said loss.

[*Demand of Judgment.*]

[*Annex Copy of Policy, marked "Exhibit A."*]

34. Goods.—If the insurance was upon the goods to be laden, state here that they were laden, and their loss. *Marsh on Ins.* (3 Ed.) 244-5, 278, 724.

35. Interest, how Alleged.—In a declaration upon a policy of insurance on the cargo of a canal-boat, it was held a sufficient averment of the plaintiff's interest to allege that the insurance was "for the account and benefit of the plaintiff as a common carrier, for hire, etc.;" and a sufficient averment of the liability incurred, to state that an amount of goods exceeding that mentioned in the policy was intrusted to him as a carrier, and that they were consumed by fire, and the plaintiff thereby became liable to pay to the respective owners a greater sum than that insured. It is not necessary to aver actual payment. *Van Natta v. Mutual Security Ins. Co.*, 2 *Sandf.* 490; and see *De Forest v. Fulton Fire Ins. Co.*, 1 *Hall*, 84.

36. Time Policy.—As to manner of pleading a want of seaworthiness to an action on a time policy, see *Jones v. The Insurance Company*, 2 *Wall. Jr. C. Ct.* 278.

37. Valued Policy, Allegation of.—That on, etc., at, etc., in consideration of the premium of dollars, then and there paid to them by the plaintiff, the defendants, by their agents duly authorized thereto, made their policy of insurance in writing, of which a copy is annexed, marked "Exhibit A," and thereby insured for him dollars upon the ship, then lying in the harbor of, for a voyage from to, against the perils of the seas, and other perils in the policy mentioned.

No. 129.

xi. *On Freight—Valued Policy.*

[TITLE.]

The plaintiff complains, and alleges:

I. [*Allege incorporation as in Form 119.*]

II. That he had an interest in the freight to be earned by the ship [*Flying Mist*], on her voyage from to, at the time of the insurance and loss hereafter mentioned, and that a large quantity of goods were shipped upon freight in her at that time.

III. That on the day of, 187., at, the defendant, in consideration of dollars to it paid, executed to the plaintiff a policy of insurance upon the said freight, a copy of which is hereto annexed, marked "Exhibit A," and thereby insured for him dollars upon certain goods then laden upon the ship, for a voyage from to, against the perils of the sea, and other perils in the policy mentioned.

IV. That the said vessel, while proceeding upon the

voyage mentioned in the said policy [*or* during said voyage, and while lying in the port of], was, [*or state* said goods, the freight whereof was insured, were] on the day of, 187., totally lost by [the perils of the sea].

V. That the plaintiff has not received any freight from the said vessel, nor did she earn any on the said voyage, by reason of her loss as aforesaid.

VI. That the plaintiff's loss thereby was dollars.

VII. That on the day of, 187., he furnished the defendant with proof of his loss and interest, and otherwise performed all the conditions of the said policy on his part.

VIII. That the defendant has not paid the said loss.

[*Demand of Judgment.*]

[*Annex Copy of Policy, marked "Exhibit A."*]

38. Averment of Loss by Collision.—That on the day of, 187., while the said [ship], with the said goods on board, was proceeding, on her said voyage, and before her arrival at her said port of destination in the said policy mentioned, another vessel, with great force and violence was carried against and run foul of the said [ship], and the said [ship] thereby was, with the said goods, sunk and [totally] lost.

39. Averment of Waiver of a Condition.—That afterwards, and on the day of, 187., at, the defendants, by their agents duly authorized thereto, waived the condition of the said policy by which [*designating it*], and released and discharged the plaintiffs from the performance thereof [*or*, and consented that the plaintiffs should, etc., *according to the facts*].

*No. 130.**xii. For a Partial Loss and Contribution.*

[TITLE.]

The plaintiff complains, and alleges:

I. [*Allege incorporation as in Form 119.*]

II. That on the day of, 187., at, in consideration of the premium of dollars then and there paid by the plaintiff to the defendant, the defendants, by their agents duly authorized thereto, made their policy of insurance in writing, of which a copy is annexed as a part of this complaint, and marked "Exhibit A," and thereby insured for him dollars upon certain goods then laden upon the ship,, for a voyage from to, against the perils of the sea [*or mention the perils which occasioned the loss*].

III. That said ship did, on the day of, sail on said voyage, and while proceeding thereon was by the perils of the seas dismasted and otherwise damaged in her hull, rigging, and appurtenances; insomuch that it was necessary for the preservation of said ship and her cargo, to throw over a part of said cargo [*or a part of her rigging and furniture*], and the same was accordingly thrown over for that purpose.

IV. That in consequence thereof, the plaintiff was obliged to expend dollars in repairing said ship, at, and is also liable to pay dollars as a contribution to and for the loss occasioned by said throwing over of part of said cargo.

V. That on the day of; 187., at, he gave to the defendant due notice and proof of the loss as aforesaid, and otherwise duly fulfilled all the conditions of said policy of insurance on his part.

VI. That no part of the same has been paid by the defendant.

[*Demand of Judgment.*]

[*Annex Copy of Policy, marked "Exhibit A."*]

40. Allegation for a Particular Average Loss.—That on the day of, 187., while on the high seas, the sea-water broke into the said ship, and damaged the said [flour] to the amount of dollars.

41. Contribution.—The owner of a vessel is not entitled to contribution on general average, for damage sustained, or expense incurred, by reason of the perils of the seas, if the vessel was unseaworthy when she left port, although from a latent defect. *Wilson v. Cross*, 33 Cal. 60.

42. Jettison.—A vessel fell in with a ship in a sinking condition. To save the lives of the ship's passengers and crew, the master of the vessel consented to receive them; but as it was necessary to throw overboard part of his cargo to make room for them, he began to do so before any of them came on board, and continued it while they were coming on board, until room enough was made. The owner of the vessel sued the insurers for a contribution to general average, for the above jettison. *Held*, that he could not recover. *Dabney v. New England Mutual Ins. Co.*, 14 All. Mass. 300.

43. Particular Average.—Furniture was insured "free of particular average," (which was taken to mean "against total loss only.") During the voyage, the vessel was wrecked and condemned, and said goods were trans-shipped, parts of sets into one vessel, and parts into another. One of said vessels was lost with its cargo, and the other arrived safely. *Held*, that the insurers were liable for the goods lost. *Pierce v. Columbia Ins. Co.*, 14 All. Mass. 320.

CHAPTER VII.

ON JUDGMENTS.

No. 131.

i. *General Form.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, in the Court [*designating it*], of County, in this State, in an action therein pending between this plaintiff and this defendant, said Court adjudged, that the defendant should pay to the plaintiff dollars, with interest from the said date.

II. That the defendant has not paid the same.

[*Demand of Judgment.*]

1. Against Counties.—A judgment against a county, under the act authorizing counties to sue and be sued, has the effect of converting a demand into an audited claim. *Sharp v. Contra Costa Co.*, 34 Cal. 284.

2. Date of Entry.—In an action on a judgment, the *postea* in the record stated that the judge presiding at *nisi prius*, sent up the record of proceedings had before him on the 19th day of November, 1855, and it appeared that judgment was signed September 26th, 1856. *Held*, that it was properly averred in the complaint, that the judg-

ment was recovered on the latter day; and if this had been an error, it was amendable at the trial, and would be disregarded on appeal. *Lazier v. Westcott*, 26 *N.Y.* 146.

3. Enforcement of Judgment.—A judgment unreversed and not suspended, may be enforced. (*Raun v. Reynolds*, 18 *Cal.*, 275.) But it need not be averred in the complaint that it was unreversed. 1 *Chitt. Pl.* 321.

4. Federal Courts.—A declaration was sufficient which averred that "at a general term of the Supreme Court in Equity, for the State of New York," etc. etc.; being thus averred to be a court of general jurisdiction, no averment was necessary that the subject matter in question was within its jurisdiction, *and the courts of the United States, will take notice of the judicial decisions in the several states, in the same manner as the courts of those states.* *Pennington v. Gibson*, 16 *How. U.S.* 65.

5. Form.—The above form of complaint is sufficient on a judgment of any domestic court, or on a judgment of a circuit court of the United States, for the jurisdiction of such courts is presumed. *Bement v. Wisner*, 1 *Code R. (N.S.)* 143; *Griswold v. Sedgwick*, 1 *Wend.*, 126.

6. How Set Out.—It has become a settled practice in declaring in an action upon a judgment, not as formerly, to set out in the declaration on the whole record of the proceedings in the original suit; but only to allege generally, that the plaintiff, by the consideration and judgment of that Court, recovered the sum mentioned therein; the original cause of judgment having passed *in rem judicatam*. *Biddle v. Wilkins*, 1 *Pet.* 686.

7. Judgment by Confession.—A judgment-creditor, made such by confession of judgment, who seeks to reach money of the judgment-debtor in the hands of junior judgment-creditors, upon the ground that he has a prior lien on the same, must aver in his complaint that at the time his judgment was rendered, the amount for which it was rendered was unpaid and due. *Denver v. Burton*, 28 *Cal.* 549.

8. Judgments, how Pleaded.—In pleading a judgment or award, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. (*Cal. Pr. Act*, § 59; *Wheeler v. Dakin*, 12 *How. Pr.* 542;

Livingston v. Oaksmith, 13 *Abb. Pr.* 183; *Carter v. Koezley*, 14 *Abb. Pr.* 147; see, also, *Hunt v. Dutcher*, 13 *How. Pr.* 538; *Rowland v. Phalen*, 1 *Bosw.* 44.) This section does not apply to foreign judgments, and a general averment of jurisdiction of a foreign tribunal would not generally be sufficient. (*Hollister v. Hollister*, 10 *How. Pr.* 539; *Barnes v. Harris*, 3 *Barb.* 603; *Ayres v. Covill*, 18 *Id.* 260; *Bement v. Wisner*, 1 *Code, Rep. (N.S.)* 143; *McLaughlin v. Nichols*, 13 *Abb. Pr.* 244.) So held in Ohio. (*Memphis Med. Coll. v. Newton*, 2 *Handy*, 163.) In Indiana, however, it is held that a complaint on a judgment of a sister state may be so alleged. *Crake v. Crake*, 18 *Ind. (Kerr)*, 156.

9. Justice's Judgment.—The law presumes nothing in favor of justices' courts. A complaint on a judgment of a justice must affirmatively show every fact conferring jurisdiction. *Swain v. Chase*, 12 *Cal.* 283; *Rowley v. Howard*, 23 *Cal.* 401; *Clyde and Rose Plank Road Co. v. Parker*, 22 *Barb.* 323; *Clyde and Rose Plank Road Co. v. Baker*, 12 *How. Pr.* 371; *Furness v. Roby*, 3 *Comst.* 193; *Barnes v. Harris*, 3 *Barb.* 603.

10. Probate Court.—In pleading the judgment of a probate court, in California, it was formerly necessary to set forth the facts which give jurisdiction. (*Smith v. Andrews*, 6 *Cal.* 652; *Townsend v. Gordon*, 19 *Cal.* 189; 7 *Cal.* 215; 10 *Id.* 110; 5 *Id.* 60.) This, however, has been changed by the Stat. of Cal., 1858, p. 95, Ch. 120; and judgments of that court are now pleaded as other judgments of courts of general jurisdiction.

No. 132.

ii. On a Judgment by Leave of Court.

[TITLE.]

The plaintiff complains, and alleges:

I. That by leave of this Court first had and obtained by order of this Court, made at the General Term held at, and on, which order was made on due notice to the defendant, the said plaintiff brings this action.

[Demand of Judgment.]

11. Necessary Averment.—In New York, in a complaint on a judgment, it is necessary to aver that leave to prosecute the action has been obtained. (*N.Y. Code*, § 71.) And if this averment is not made, it does not state a sufficient cause of action. (*Graham v. Scripture*, 26 *How. Pr.* 501.) The practice in California is, however, different, as there suit may be commenced without leave of court previously obtained. Yet there are in our practice numerous instances where leave of court must be first obtained; such as suits against receivers, etc.

No. 133.

iii. The Same, by an Assignee.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, in the Court of [*or before J. P., a justice of the peace in and for the Town of, etc.*], in an action wherein one C. D. was plaintiff and this defendant was the then defendant, the said Court [*or Justice duly*] adjudged that the defendant should pay to the plaintiff dollars, with interest from the said date.

II. That on the day of, 187., at, the said C. D. assigned said judgment to this plaintiff.

III. That the defendant has not paid the same.

[*Demand of Judgment.*]

12. Demand.—It is not necessary to aver any demand of payment by the assignee, or any refusal to pay by the debtor. *Moss v. Shannon*, 1 *Hill*. 175.

*No. 134.*iv. *On a Foreign Judgment of a Court of General Jurisdiction.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, in the State [*or* Kingdom] of, the Court of that [State], in an action therein pending between plaintiff and defendant, duly adjudged that defendant should pay to plaintiff dollars, with interest from the said date.

II. That defendant has not paid the same.

[*Demand of Judgment.*]

13. Allegations Essential.—In pleading the judgment of a sister state, it is sufficient to allege that it was duly recovered. Facts conferring jurisdiction need not be stated; overruling dictum, 10 *How. Pr.* 532; 18 *Barb.* 260; *Halstead v. Black*, 17 *Abb. Pr.* 227.

14. Appearance, how Alleged.—Alleging that defendant was duly notified, but not saying of what; or that he had personal notice of the commencement of the suit, without saying from whom, is bad. *Long v. Long*, 1 *Hill*, 597.

15. Appearance without Summons.—In pleading the judgment of a court of general jurisdiction of another State, if the defendant therein was served or appeared, the facts upon which jurisdiction is founded need not be averred. Want of jurisdiction is matter of defense. *Wheeler v. Raymond*, 8 *Cow.* 311.

16. Courts of General Jurisdiction.—It is necessary to allege jurisdiction only in the case of a court whose title indicates that it may be one of limited jurisdiction. In such a case it is better to aver that the court had a general jurisdiction. This was held necessary in an action on the judgment of a county circuit court of another state, in

(*McLaughlin v. Nichols*, 13 *Abb. Pr.* 244.) In (*Foot v. Stevens*, 17 *Wend.* 483), it is said that courts of common pleas, and county courts of other states, are to be presumed of general jurisdiction. Compare, also, *Frees v. Ford*, 6 *N.Y.* 176; *Kundolf v. Thalheimer*, 17 *Barb.* 506.

17. Exemplification of Judgment.—A certificate of exemplification of a judgment rendered in another State, attested by the Clerk under the seal of the Court, and when the presiding Judge of the Court certifies that the attestation is in due form of law, is sufficient to sustain an action in another state. (*Thompson v. Manrow*, 1 *Cal.* 428.) It is only necessary that the certificate should state the main facts which are made necessary by the Act of Congress respecting the authentication of judgments. It is not necessary to aver jurisdiction. (*Low v. Burrows*, 12 *Cal.* 181.) A certificate of the proceedings of the Surrogate's Court of New York, which states that A. W. B. is Surrogate of the City and County of New York, and acting Clerk of the Surrogate's Court; that he has compared the transcript of the papers with the original records in the matter of the estate of W. Y., and finds the same to be correct, and a true copy of all the proceedings; and that the certificate is in due form of law; in testimony whereof he sets his hand and affixes his seal of office—is sufficient. *Id.*

18. Force and Effect of Foreign Judgment.—The judgment in one state is to be received, and have full force, effect, and virtue in a nother state. *Conklin's Treatise*, (*N.S.*) 371, 372; *Mills v. Duryee*, 7 *Cranch*, 481; *Hampton v. McConnel*, 3 *Wheaton*, 234; *Mayhew v. Thatcher*, 6 *Wheaton*, 129; *Hopkins v. Lee*, *Id.* 109; *Armstrong v. Carson*, 2 *Dall.* 302; *Green v. Sarmiento*, 3 *Washington C.C.*; *Borden v. Fitch*, 15 *Johns. R.* 121; *Shumway v. Stillman*, 4 *Cowen*, 293.

19. Indiana.—In Indiana, the record of the judgment or a transcript of it must be set forth. (*Brady v. Murphy*, 19 *Ind.* 258; *Adkins v. Hudson*, *Id.* 392.) It should not be, in New York. *Harlow v. Hamilton*, 6 *How. Pr.* 475.

20. Jurisdiction.—In actions on judgment obtained in another state, where the transcript shows the jurisdiction of the court on its face, it is not necessary to aver jurisdiction. (*Low v. Burrows*, 12 *Cal.* 181.) How such a complaint should state the transcript, see *Richardson v. Hickman*, 22 *Ind.* 244.

21. Ohio.—If the judgment was recovered in Ohio against the company by an erroneous name, but the suit upon the judgment was

brought in Indiana against the company, using its chartered name correctly, accompanied with an averment that it was the same company, this mistake is no ground of error ; it could only be taken advantage of by a plea in abatement in the suit in which the first judgment was recovered. (*Lafayette Insurance Co. v. French*, 18 *How. U.S.* 404.) In Ohio, it is held that a transcript of a record showing the recovery of a judgment, is not "an instrument for the unconditional payment of money only," and cannot be made a part of the complaint by reference. *Memphis Medical College v. Newton*, 2 *Handy*, 163.

22. Pennsylvania.—In an action in Kansas upon a judgment recovered in the Court of Common Pleas of Pennsylvania, the petition need not aver that that court had jurisdiction, either of the person or cause of action. *Butcher v. Bank of Brownsville*, 2 *Kansas*, 70.

No. 135.

v. *On a Foreign Judgment of an Inferior Tribunal.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereafter mentioned, J. P. was a justice of the peace, in and for the Town of, in the County of, and State of, having authority under and by virtue of an act of said State, entitled [*title of act*], passed on the . . . day of, 187., to hold court, and having jurisdiction as such over action of [*state jurisdiction to include the cause of action*].

II. That on the day of, 187., at, aforesaid, the plaintiff commenced an action against the defendant before the said Justice, by filing his complaint, and causing summons to be duly issued by said Justice on that day, for the recovery of [*state what*], which summons was duly and personally served on the defendant.

III. That on the day of, 187., in said action, the plaintiff recovered judgment, which was duly given by said Justice against the defendant, for the sum of dollars, to wit, dollars for said debt, with dollars for interest from the said date, and dollars costs.

IV. That defendant has not paid the same.

[*Demand of Judgment.*]

23. Action.—It appears that the action of *indebitatus assumpsit* lies on a judgment of a justice of the peace. *Green v. Fry*, 1 *Cranch C. Ct.* 137.

24. Before the Said Justice.—The appropriate mode of pleading a judgment of a justice of the peace, is to allege that it was recovered "before him," not "in his court." *McCarthy v. Noble*, 5 *N.Y. Leg. Obs.* 380.

25. Costs.—This should be inserted in the third allegation, if it would not otherwise appear that the amount of the debt did not exceed the jurisdiction. *Smith v. Mumford*, 9 *Cow.* 26.

26. Designation of Office.—It is necessary, under § 59, *Cal. Pr. Act*, as well as in New York, (*N.Y. Code* § 161,) in pleading the determination of an officer of special jurisdiction, to designate the officer; an averment that such determination was duly made is insufficient. *Carter v. Koezley*, 14 *Abb. Pr.* 147.

27. Duly Given.—The form of allegation, "recovered judgment, which was duly given," is suggested by the Court in (*Crake v. Crake*, 18 *Ind.* 156.) As to how far other words may be deemed equivalent to "duly given," compare *Willis v. Havemeyer*, 5 *Duer*, 447; *Hunt v. Dutcher*, 13 *How. Pr.* 538.

28. Duly Adjudged.—If the judgment was rendered in a justice's court, "duly" must be inserted. *Thomas v. Robinson*, 3 *Wend.* 268; *Keys v. Grannis*, 3 *Nev.* 548.

29. Jurisdiction of Person.—To show that jurisdiction over the person had been acquired, it is necessary to aver, either that the party

appeared, or that process was sued out and duly served on him. *Cornell v. Barnes*, 7 *Hill*, 35.

30. Justices' Courts.—The authority under which the judgment was rendered should be set forth. (*Stiles v. Stewart*, 12 *Wend.* 473.) A general allegation that the justice had jurisdiction is not enough. The statute giving jurisdiction should be pleaded. (*Sheldon v. Hopkins*, 7 *Wend.* 435; *Stiles v. Stewart*, 12 *Id.* 473.) A judgment against the plaintiff for costs of a nonsuit only, is an exception to this rule. *Turner v. Roby*, 3 *N.Y.* 193.

31. Jurisdictional Facts.—Such facts need not be alleeged as, residence of defendant, that summons was returned, that return was made thereon, that time of day was specified in summons, nor that court was held at the time and place specified. *Barnes v. Harris*, 4 *N.Y.* 374; 3 *Barb.* 603.

32. Such Proceedings were Had.—After stating the facts on which jurisdiction depends, it is sufficient, without setting out the proceedings, to say, "such proceedings were had," that plaintiff recovered, etc. *Turner v. Roby*, 3 *N.Y.* 193.

CHAPTER VIII.

LIABILITIES CREATED BY STATUTE.

No. 136.

i. Penalties under the Statute—General Form.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant [*here state acts constituting a violation of the statute, either following the words of*

the statute, giving the title of the act, or setting forth the facts specifically].

II. That thereby the defendant became indebted in the sum of [*the penalty or forfeiture*], to the [*here insert for whose use the same is given*].

[*Demand of Judgment.*]

1. Action Determined.—The repeal of a law imposing a penalty determines the action. *People ex rel. Cook v. Board of Police*, 40 *Barb.* 426; 16 *Abb. Pr.* 473.

2. Against the Form of the Statute.—A declaration for a statute penalty which concluded, against the form of the *statutes*, when the suit is founded on a single statute: *Held* good on error. (*Kenrich v. United States*, 1 *Gall.* 268.) Where the conclusion is “against the law in such case made and provided,” it is not a conclusion against the form of a statute, and is bad on error. (2 *Mass.* 138; *Smith v. United States*, 1 *Gall.* 261.) So, also, in a debt for a penalty, an averment, “whereby, and by force of the laws and statutes of the United States, an action hath accrued,” is bad on error. (*Cross v. United States*, 1 *Gall.* 26.) The insertion of the words “contrary to the statute,” at the end of a declaration or indictment, does not, as a general rule, relate to the last preceding averments alone, but to the whole subject matter alleged to constitute the offense. *Jones v. Van Zandt*, 5 *How. U.S.* 215.

3. Attorney Practising without License.—An attorney practising without a license may be punished as in other cases of contempt. (*Gen. Laws of Cal.* ¶ 398.) The right to practice is not “property,” nor in any sense a “contract,” within the constitutional meaning of those terms. (*Cohen v. Wright*, 22 *Cal.* 293.) The right to practice is not a constitutional right, but a statutory privilege. (*Id.*) But the authority of an attorney to appear will be presumed where nothing to the contrary appears. *Hayes v. Shattuck*, 21 *Cal.* 51; *Wilson v. Cleaveland*, 30 *Cal.* 192; *Holmes v. Rogers*, 13 *Cal.* 191; *Turner v. Caruthers*, 17 *Cal.* 431; *Ricketson v. Compton*, 23 *Cal.* 636.

4. Copyright.—A declaration for the penalty imposed for putting the imprint of a copyright upon a work not legally copyrighted, in the

name of *two persons*, is bad on general demurrer. *Ferrett v. Atwill*, 1 *Blatchf.* 151; S.C., 4 *N.Y. Leg. Obs.* 215.

5. Debt Lies.—When a penalty is given by statute, and no remedy is provided, debt will lie. (*Jacob v. United States*, 1 *Brock. Marsh.* 520.) And this although it is uncertain. (*Corporation of Washington v. Eaton*, 4 *Cranch C. Ct.* 458.) In an action for debt, brought to recover several penalties (under Section One of the Act of 1790), against the master of a vessel for shipping seamen without articles, a single count for all the penalties is sufficient. 13 *Wend.* 396; *Wolverton v. Lacy*, 8 *Law R. (N.S.)* 672.

6. Facts Alleged.—In an action on a statute, the party prosecuted must allege every fact necessary to make out his title and his competency to sue. 2 *Stra.* 828; 5 *East.* 315; 4 *Johns.* 193; 13 *Id.* 428; 15 *Wend.* 184; 2 *N.H.* 105; 2 *Aik.* 41; 11 *Mass.* 364; 12 *Id.* 466; 7 *Id.* 202; *Ferrett v. Atwill*, 1 *Blatchf.* 151; S.C., 4 *N.Y. Leg. Obs.* 215.

7. Failure to Pay Assessment.—The failure of one partner in a ditch to pay his proportion of the expenses of the concern, does not forfeit his right in the common property. (*Kimball v. Gearhart*, 12 *Cal.* 27.) Where forfeiture is claimed under a mining regulation or custom, this regulation or custom will be most strictly construed under the claim of forfeiture. *Colman v. Clements*, 23 *Cal.* 245; *Wiseman v. McNulty*, 25 *Cal.* 230.

8. Ferries and Toll Bridges.—For fast driving or riding, (*Gen. Laws of Cal.*, ¶ 3,091.) Or refusal to pay toll thereon, (*Id.* 3,092.) In an action brought to recover damages by the owners of a licensed ferry against a party alleged to have run a ferry within the limits prohibited by law, it was held that the complaint should have alleged that defendant ran his ferry for a fee or reward, or the promise or expectation of it, or that he ran it for other than his own personal use or that of his family, and that the omission of these allegations was fatal. *Hanson v. Webb*, 3 *Cal.* 236.

9. Forfeiture under Statute.—When a forfeiture is purely the creation of statute, no other process or procedure can be made use of to enforce the forfeiture than that which the statute prescribes. (*Reed v. Omnibus R.R. Co.*, 33 *Cal.* 212.) In an action to enforce a penalty or forfeiture imposed by statute, the claim is to be strictly construed. (*Askew v. Ebberts*, 22 *Cal.* 263.) If there be any rule requiring the

payment of a debt, that rule cannot apply to the case of a judgment rendered for a penalty under the penal statute. (*Chester v. Miller*, 13 *Cal.* 558.) An action founded on a statute to recover a penalty, where no penalty is imposed, cannot be sustained. (*Board of Health v. P. M. S. S. Co.*, 1 *Cal.* 197.) In order to have a forfeiture take place, there must be some person who is entitled to receive the benefit of the forfeiture. *Wiseman v. McNulty*, 25 *Cal.* 230.

10. Forfeiture in Bond.—Where the parties to a bond stipulate among themselves for a forfeiture, such forfeiture cannot defeat the plaintiff's right to a recovery. *Bagley v. Eaton*, 5 *Cal.* 497.

11. Forfeiture in Rem.—How far the strict rules of the common law, as to pleading in criminal cases, are applicable to informations for forfeitures *in rem*, considered, *The "Palmyra,"* 12 *Wheat.* 1.

12. Forfeiture of Title to Real Estate.—No forfeiture of real estate can take place for non-performance of conditions precedent or subsequent, unless there are two contracting parties who have, at the same time, or successively, an interest in the estate upon which the condition is reserved. (*Wiseman v. McNulty*, 25 *Cal.* 230.) No forfeiture accrues to a title otherwise good, by failure to present it to the Board of Land Commissioners. (*Gregory v. McPherson*, 13 *Cal.* 562.) The United States, after the Treaty of Guadalupe Hidalgo, did not become vested with any authority to prosecute a claim for forfeiture or escheat that had accrued in California to the Mexican Government. *People v. Folsom*, 5 *Cal.* 373.

13. Form of Allegation.—That the statute may be pleaded by *express reference*, by *reciting* the statute, or by *stating the facts* which bring the case within it, as in the above form, see "*Complaints in General*," p. 244, Note 132; see, also, (*People v. Bennett*, 5 *Abb. Pr.* 384; overruling *Morehouse v. Crilley*, 8 *How. Pr.* 31.) It is not necessary to conclude "against the form of the statute." (*People v. Bartow*, 6 *Cow.* 290; and see *Lee v. Clarke*, 2 *East.* 333.) Where a number of penalties are incurred in one act, they may all be included in one count. In an action against an officer to recover a penalty imposed by a general statute for any neglect or refusal to perform a duty, it is enough to refer to such statute, though the particular duty in question was created by a subsequent statute. *Morris v. People*, 3 *Den.* 381.

14. Gaming.—For violation of the gambling laws, (*Gen. Laws*

of Cal. ¶ 3,323.) An allegation in a complaint that the parties kept a saloon for the purpose of gaming, and selling liquors and cigars, does not raise the presumption that the gaming was necessarily unlawful, or that the saloon was a common gaming house, as the word might apply to lawful games, as billiards, etc. *Whipley v. Fowler*, 6 *Cal.* 632.

15. Illinois.—The remedy is given by statute for driving off stock, horses, cattle, hogs, sheep, etc. (*Scates, etc., Stat.* 90.) So, against a railroad company for neglecting to ring bell at a crossing. 28 *Ill.* 284.

16. Intent.—In an action for a statute penalty, intent to violate the law must be shown; but a neglect may be so gross as to amount to a criminal intent. *Sturges v. Maitland*, *Anth. N.P.* 208.

17. Lotteries.—For penalties under the Act concerning Lotteries, Gift Enterprises, etc., see (*Gen. Laws of Cal.* ¶ 4,425.) A "gift sale," viz., of envelopes, at twenty-five cents each, containing songs, etc., and a ticket entitling the holder to purchase for the further price of a dollar a specified article out of a large stock, such article being worth in some cases much more, and in many cases less, than a dollar, is a lottery. *Dunn v. People*, 40 *Ill.* 465.

18. Marks and Brands.—For penalty under the Act concerning Marks and Brands, see (*Gen. Laws of Cal.* ¶ 4,445.) For non-compliance with the Act in relation to Marks and Brands, *Gen. Laws of Cal.* ¶¶ 4,451, 4,456.) That in an action for a penalty for altering the inspector's marks on barrels of flour, it is necessary to set out the marks, and the manner of the alteration, see *Cloud v. Hewitt*, 4 *Cranch C. Ct.* 199.

19. Massachusetts.—In Massachusetts, in an action against a bank to recover the penalty provided by Rev. Sts. c. 36, § 29, for delaying payment of its bills, it is not necessary to set out copies of the bills in the declaration. *Suffolk Bank v. Lowell Bank*, 8 *Allen (Mass.)* 355.

20. Office and Officers.—For failure to comply with the statute in relation to fee books, (*Gen. Laws of Cal.* ¶ 3,028.) For failure of duty to execute warrants, and for neglect of duty, (*Id.* ¶ 3,175.) For official misfeasance, (*Id.* ¶ 4,769.) For charging improper fees, (*Id.* ¶ 4,778; 5 *Cal.* 86.) In an action against an officer to recover a penalty imposed by a general statute, it is sufficient to refer to such statute, though the particular duty in question was created by a subsequent statute. *Morris v. People*, 3 *Den.* 381.

21. Ohio.—*In Ohio*, an action lies against school directors, for refusal to permit children to attend public school. *Lane v. Baker*, 12 *Ohio*, 237.

22. Parties Liable.—Where two or more concur in the act of aiding, and but one penalty attaches, they may be sued together. *Cro. Eliz.* 480; *F. Moore*, 453; *Cowp.* 610; 2 *East.* 570; *Warren v. Doolittle*, 5 *Cow.* 678; compare *Marsh v. Shute*, 1 *Den.* 230; *Ingersoll v. Skinner*, *Id.* 540; *Mayor of N.Y. v. Ordrenan*, 12 *Johns.* 122; see, also, *Palmer v. Conly*, 4 *Den.* 374.

23. Penal Actions.—In penal actions founded on a statute, a reference to the statute is usually, but not necessarily, made, (*Brown v. Harman*, 21 *Barb.* 510,) for the purpose of informing the defendant distinctly of the nature and character of the offense. (*Shaw v. Tobias*, 3 *Comst.* 190.) And in cases where no general form of complaint is given, the plaintiff must set forth the particular acts or omissions which constitute the cause of action. (17 *Wend.* 86; *People v. Brooks*, 4 *Den.* 469; *Cole v. Smith*, 14 *Johns.* 193; *Bigelow v. Johnson*, 13 *Id.* 428.) But omitting to refer to the statute is a defect of form only. *O'Malley v. Reese*, 6 *Barb.* 658.

24. Penal Statute.—In declaring on a penal statute, it is sufficient to pursue the words of the statute, and not essential to conclude "against the form of the statute." (*People v. Barton*, 6 *Cow.* 290; *Lee v. Clarke*, 2 *East.* 333.) That the declaration must aver that the act complained of was done contrary to the statute, (*Parker v. Haworth*, 4 *McLean*, 370.) A declaration founded exclusively upon a statute, and not maintainable at common law, must conclude, "against the form of the statute." *Chitty on Plead.* 246, 405; 1 *Gall.* 257; *Id.* 261; 1 *Saund.* 135, n.; *Jones v. Van Zandt*, 2 *McLean*, 611; S.C., 1 *West. Law J.* 56.) That it is essential, see (*Sears v. United States*, 1 *Gall.* 257.) A declaration, if founded on an amendatory act, which refers to and contains a former one, should conclude "against the statute," and not "statutes." (*Falconer v. Campbell*, 2 *McLean*, 195.) That a declaration on a penal statute need not aver the uses to which the forfeiture is to be applied, see *Sears v. United States*, 1 *Gall.* 257.

25. Penalty Defined.—*Penalty implies* a prohibition. (*Story on Cont.* 614; 1 *Taint.* 136; 10 *Bing.* 110; 1 *Pars. on Cont.* 381; 3 *Den.* 226; *Best v. Bauder*, 29 *How. Pr.* 489.) The words "penalty" and "forfeit" in a statute, used interchangeably, (Commissioners of

Saratoga v. Doherty, 16 *How. Pr.* 46.) A penalty is not liquidated damages. *People v. Love*, 19 *Cal.* 681.

26. Penalty in Agreement.—If an agreement contain a penalty, the plaintiff may bring debt for the same, and for no more, or covenant, and recover more or less damages than the penalty. *Martin v. Taylor* 1 *Wash. C. Ct.* 1.

27. Railroad Companies—Excessive Fare.—In an action against a railroad company for breach of duty by such a company in not conveying a passenger, it is not necessary for plaintiff to allege in his complaint a strict legal tender of his fare. (*Tarbell v. C. P. R.R. Co.*, 34 *Cal.* 616.) It is sufficient to allege that plaintiff was ready and willing, and offered to pay such sum of money as the defendant was legally entitled to charge. The transportation and payment of the fare are contemporaneous acts. (*Id.*) In an action against the New York Central Railroad Co., to recover a statutory penalty for exacting an excessive fare: *Held*, that it was not necessary that the complaint should set out the various enactments consolidating the several companies which make up the New York Central Railroad Company, so as to show that the latter company is restricted to a fare of two cents per mile for each passenger; but that it was enough to allege that the defendants had been duly organized, that they were entitled to demand and receive of passengers a certain rate of fare, and that they had demanded and received a higher rate. *Nellis v. N.Y. Cent. R.R. Co.*, 30 *N.Y.* 505.

28. Several Penalties.—For several penalties incurred in one act, plaintiffs may declare generally in one count. (*People v. McFadden*, 13 *Wend.* 396.) Only one penalty can be enforced for the same act. (*Driskill v. Parrish*, 3 *McLean*, 631.) Under an ordinance forbidding both the sale of a thing and its exposure to sale, a single act of selling cannot be separated so as to impose therefor two penalties. In case of an actual sale, the exposure to sale is merged in the sale. *City of Brooklyn v. Toynbee*, 31 *Barb.* 282.

29. Telegraph Messages.—For divulging the contents of a message, (*Gen. Laws of Cal.* ¶ 7,057.) Where the telegraph company fails to transmit a message, upon compliance by the person contracting with it with the conditions required by law, an action lies for the penalty. (*Thurn v. Alta Tel. Co.*, 15 *Cal.* 472.) And the party who contracts is entitled to the penalty. *Id.*

30. Theatrical Exhibitions.—Complaint in an action for penalty for giving theatrical exhibitions without license, in violation of the Act of 1839, ch. 13: *Held* sufficient on demurrer. (People *v.* Koll, 3 *Keyes*, 236.) For violation of the Sunday Law, (*Gen. Laws of Cal.* ¶ 6,959.) For doing business on Sunday, (*Id.* 6,962; 18 *Cal.* 678; 19 *Cal.* 130;) in San Francisco, (*Gen. Laws of Cal.*, ¶¶ 6,966, 6,968.) A complaint which charges that the defendant “did willfully and unlawfully on the first day of the week, commonly called Sunday, to wit: on the Sabbath day, get up, and in getting up and opening of a theater,” contains a sufficient statement of the facts constituting the offense of getting up a theater on the Sabbath day. People *v.* Maguire, 26 *Cal.* 635.

31. Venue.—Actions for the recovery of a penalty or forfeiture imposed by statute, shall be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial. *Cal. Pr. Act*, § 19.

32. Within the Statute.—Such a declaration must bring the offense charged within the statute, clearly; whether looking to its language or spirit. Jones *v.* Van Zandt, 5 *How. Pr.* 215; affirming S.C., 2 *McLean*, 611.

No. 137.

ii. For Selling Liquor without a License.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant sold to one A. B. [*or to divers persons*] strong liquors [*or spirituous liquors, or wines*], in quantities less than by the bottle [*or otherwise, according to the terms of the ordinance or statute*].

II. That the defendant had not then a license to sell liquors.

Wherefore plaintiff demands judgment for dollars.

33. Form.—For another form, see (*People v. Bennett*, 5 *Abb. Pr.* 284.) To follow the words of the act is sufficient. See *Cole v. Jessup*, 10 *N.Y.* 96; 10 *How. Pr.* 515.

No. 138.

iii. *Against a Witness, for Disobeying Subpœna.*

[TITLE.]

I. That on the day of, 187., at, the plaintiff caused the defendant to be duly served with a subpœna commanding him to attend as a witness in Court, in and for the County of, in this State, on the day of, 187., there to give testimony on behalf of the plaintiff in an action there pending, wherein this plaintiff was the plaintiff, and one C. D. was defendant [*or otherwise designate the proceedings*].

II. That at the same time the plaintiff caused dollars, the lawful fees of the said witness, to be paid [*or tendered*] to him.

III. That the defendant failed to attend as commanded. Whereby the defendant became indebted to the plaintiff in the amount of dollars, according to the provisions of the statute.

[IV. *Allege special damage, if any, thus:* The plaintiff further says, that thereby the plaintiff, when said action was called for trial, was compelled, for want of the testimony of said defendant, without whose testimony he could not safely proceed to the trial of said action, to move the said Court to continue the said action; and the said Court did continue the same, and the plaintiff was compelled to pay on said continuance, as costs thereof,

..... dollars, which sum he was so compelled to pay by reason of the said refusal of the said defendant.]

V. That by reason of the premises, the defendant forfeited to the plaintiff the sum of dollars.

[*Demand of Judgment.*]

34. Witness Refusing to Answer.—An action lies at common law, against a witness refusing to answer or attend under a subpoena. (*Dougl. Rep.* 561; *Peake*, 60; 13 *East*. 15; *Warner v. Lucas*, 10 *Ohio*, 336.) The complaint must aver that the witness fees were paid or tendered to him. (*McKeon v. Lane*, 1 *Hall*, 319.) It would seem that a general allegation, that he was legally subpoenaed, is insufficient. *Id.*

No. 139.

iv. *For Violation of Ordinance of Board of Supervisors.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the day of, 187., the Board of Supervisors of the County of, in pursuance of the power in them vested by law, passed a law entitled, "An Order, Regulation, or Ordinance, etc. [*giving title of the same*], a copy of which is annexed as a part of this complaint.

II. That since the passing thereof, to wit, on the day of, 187., the defendant [*here state fully wherein the defendant disobeyed the order*], contrary to the provisions of the said ordinance above mentioned.

III. That by reason of the premises, the defendant forfeited to the plaintiff the sum of dollars.

[*Demand of Judgment.*]

35. Authority to Enact.—The authority to enact may be averred in general terms. *Stuyvesant v. Mayor of N.Y.*, 7 *Cow.* 588.

36. Form.—This is substantially the form of the complaint in *Smith v. Levinus*, 8 *N.Y.* 472.

37. Indiana.—In Indiana, a copy of the by-law or ordinance should be made a part of the complaint. *Green v. Indianapolis*, 22 *Ind.* 192.

38. Ordinance Averred.—In general, the by-laws of all corporate bodies, including municipal corporations, must be set forth in pleading, when they are sought to be enforced by an action, or set up as a protection. *Wilc. on Mun. Corp.* pt. 1, § 430; *Harker v. Mayor etc. of N.Y.*, 17 *Wend.* 199; *People v. Mayor etc. of N.Y.*, 7 *How. Pr.* 81.

CHAPTER IX.

FOR MONEY HAD AND RECEIVED TO PLAINTIFF'S USE.

No. 140.

i. *Common Form.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant received dollars, from one A. B., to be paid to plaintiff.

II. That the defendant has not paid the same.

[*Demand of Judgment.*]

1. Defendants, how Charged.—Where the complaint charges that A., being indebted to the plaintiff in a sum of money, it was agreed between the plaintiff and defendant that A. should pay the same

to plaintiff at the request of plaintiff, and thereafter A. paid to defendant said sum in gold coin of the United States and for the use and benefit of plaintiff, that defendant refused to pay the same to the plaintiff upon the request duly made, an action to recover said sum in gold coin is an action for money had and received, and defendant is not charged as a bailee. *Went v. Ross*, 33 *Cal.* 650.

2. Demand.—It is not necessary that the plaintiff, in an action for money received by defendant for his use, should make a demand before suit, where it was the duty of the defendant to have remitted the money. *Stacy v. Graham*, 14 *N.Y.* 492.

3. "For Plaintiff's Use."—The common allegation that the defendant received money "for the use of the plaintiff," is open to objection on the ground of its indefiniteness. In (*Lienan v. Lincoln*, 2 *Duer*, 670,) it was held bad on demurrer. A complaint which avers "that the defendant received the sum of dollars, belonging to or on account of the plaintiff, and which is now due him," states facts sufficient to constitute a cause of action. *Betts v. Bache*, 14 *Abb. Pr.* 279.

4. Involuntary Payments.—The influence exerted by the provisions of the statutes of the United States, requiring stamps to be placed on passage tickets by steamer from San Francisco to New York, does not constitute the kind of coercion or compulsion which the law recognizes as sufficient to render the payment therefor involuntary. (*Garrison v. Tillinghast*, 18 *Cal.* 404.) Generally, to constitute compulsion or coercion, so as to render a payment involuntary, there must be some actual or threatened exercise of power, possessed or supposed to be possessed by the party exacting or receiving the money. (*Brumagim v. Tillinghast*, 18 *Cal.* 265.) The object of the protest is to take from the payment its voluntary character, and conserve to the party the right to recover it back. *Brumagim v. Tillinghast*, 18 *Cal.* 265.

5. Money Extorted by Duress.—A complaint in an action to recover money wrongfully obtained, under color of judicial proceedings, must contain such averments as will exclude the idea that the money could have been lawfully obtained. (*Funkhouser v. How*, 17 *Mo.* 225.) The complaint must state, that it was wrongfully obtained. (*Funkhouser v. How*, 17 *Mo.* 225.) And not state a mere conclusion of law, but the facts should be fully detailed, so that the Court may see from the facts that the payment was compulsory. (*Commercial Bank*

v. Rochester, 41 *Barb.* 341.) It is not sufficient to allege compulsion in a general way. Money extorted by duress of goods may be recovered. 2 *Strange*, 915; 3 *Johns. Cas.* 238; 4 *T.R.* 485; *Id.* 561; 22 *Sandf.* 479; 7 *Greenlf.* 134; 4 *Harr. & J.* 54; 2 *Shobh.* 257; 3 *N.H.* 508; 7 *Barn. & Cr.* 73; 7 *Mann. & Gr.* 253; *Tutt v. Ide*, 3 *Blatchf.* 249.

6. Money not Credited.—Where money was not credited on an account upon which judgment by default was rendered, it may be recovered back. 16 *Mass.* 306; 6 *Id.* 14; 17 *Id.* 394; 4 *Pick*, 228; 11 *Johns.* 441; 8 *Id.* 470; *Phil. on Ev.*; *Cow. & H.* 832; *contra*, 1 *N.H.* 33; 1 *Ala.* 103; 11 *Id.* 695; *Smith v. Weeks*, 26 *Barb.* 463.

7. Money Paid under Protest.—The fact that a party pays money under protest does not change the character of the transaction, or enable him to receive it back, unless the payment was under duress or coercion, or where undue advantage was taken of his situation. *Brumagim v. Tillinghast*, 18 *Cal.* 265.

8. Promise Implied.—When a person recovers the money of another, and applies it to his own use, the law implies a promise to repay it. (*Durnond v. Carpenter*, 3 *Johns.* 183.) Where one receives at the request of another a sum for a third person, with directions to pay the same over, it is equivalent to an express promise to pay the same, and the latter may maintain an action for money had and received. (12 *Johns* 276; 1 *H. Black.* 229; 2 *Raym.* 928; 6 *Mod.* 36; 14 *East*, 590; 2 *Camp. N. P. C.* 426; 3 *Id.* 109; 2 *Hill.* 1; 4 *Den.* 97.) And no consideration need be shown. (17 *How. Pr.* 289; *Berry v. Mayhew*, 1 *Daly*, 54.) Where one receives the money of another, and has not the right conscientiously to retain it, a privity between the true owner and the receiver will be implied, as well as a promise to repay it. *Caussidiere v. Beers*, 2 *Keyes*, 198.

Promise need not be Alleged.—The implied promise to pay is a fiction which need not be alleged. *Byxbie v. Wood*, 24 *N.Y.* 607.

10. Special Contract.—Where a special contract remains open, the remedy is on the contract, but if the contract has been put an end to or is fully performed, an action for money had and received lies to recover the payment remaining due. (*Chesapeake and Ohio Canal Co. v. Knapp*, 9 *Pet.* 541; *Perkins v. Hart*, 11 *Wheat.* 237; see *Rambler v. Choat*, 1 *Cranch C. Ct.* 167.) In such case, the facts of the special

contract may be gone into to show the amount due. *Ames v. La Rue*, 2 *McLean*, 216.

11. Statute of Limitations.—Where the promise is laid of a day more than two years prior to the commencement of the action, the complaint is demurrable on the ground that it shows the demand to be barred by the Statute of Limitations. *Keller v. Hicks*, 22 *Cal.* 457.

12. Voluntary Payment.—Money voluntarily paid upon a claim of right with full knowledge of all the facts, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability. (*Brumagim v. Tillinghast*, 18 *Cal.* 265.) Money voluntarily paid cannot be recovered back, even though it could not have been enforced by law. (*Corkle v. Maxwell*, 3 *Blatchf.* 413; *Sturges v. United States*, *Dev.* 20.) So, money advanced on part performance of an agreement, cannot be recovered back. *Hansbrough v. Peck*, 5 *Wall. U.S.* 497.

13. When Action Lies.—This action lies: *First*, Wherever the defendant has received money which he is bound in justice and equity to refund. *Second*, Where an agent is not the mere carrier or instrument for transmitting the fund, but has the power of retaining it, and before he has paid over the money, has received notice of the plaintiff's claim, and a warning not to part with the fund. *Third*, Where there exists a privity between the plaintiff and defendant. (*Cary v. Curtis*, 3 *How. U.S.* 236.) The general rule is, that an action for money received lies, whenever money has been received by the defendant, which *ex equo et bono*, belongs to the plaintiff. (*Tutt v. Ide*, 3 *Blatchf.* 249.) Or which in equity and conscience he has no right to retain; (*Kreutz v. Livingston*, 15 *Cal.* 344;) whether there be any privity between the parties or not.

14. When it will not Lie.—The simple facts that A., owing money to B., chose to pay it to C., under the impression that C. was entitled to control the services of B., and to receive all compensation therefor, do not entitle B. to maintain an action against C. for money had and received. *Murphy v. Ball*, 38 *Barb.* 262.

No. 141.

ii. *Same, against Attorney or Agent, with Demand.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at the County of, State of, the defendant received from the plaintiff, as the agent of said plaintiff, the sum of dollars, to the use of the said plaintiff.

II. That thereafter, and before this action, the said plaintiff demanded payment thereof from the said defendant.

III. That the defendant has not paid the same.

[*Demand of Judgment.*]

15. Action Against Agent.—Either one of several joint owners of claims against a third person, they not appearing to be partners, may maintain an action against an agent, to recover his share of money had and received by the latter from the debtor. *Allen v. Brown*, 51 *Barb.* 86.

16. Assignee.—An assignee to recover a surplus collected by a creditor, or of the assignor, must give notice of the assignment, and make a demand. *Sears v. Patrick*, 23 *Went.* 528.

17. Attorney's Liability.—An attorney is not liable for moneys collected until after a demand or instructions to remit. (*Beardsley v. Root*, 11 *Johns.* 464; *Stafford v. Richardson*, 15 *Wend.* 302; *Taylor v. Bates*, 5 *Cow.* 376; *Rathbun v. Ingalls*, 7 *Wend.* 320; *Walradt v. Maynard*, 3 *Barb.* 584.) But the right to a demand may be waived. And where an attorney set up a claim against his client to a larger amount, it was held a waiver of a demand. (*Walradt v. Maynard*, 3 *Barb.* 584; and see *Satterlee v. Frazer*, 2 *Sandf.* 141.) Attorneys as partners are

liable, although it was paid to one of them, and has been demanded from him only, *McFarland v. Crary*, 6 *Wend.* 297; compare *Ayrault v. Chamberlin*, 26 *Barb.* 83.

18. Corporation.—In an action by a corporation to recover funds received by the treasurer thereof, if the complaint shows the relation of the parties, and gives a statement of the moneys received by him, and that defendant is indebted, it is sufficient. A demand will be inferred; and if none were made, defendant should pay the debt but not the costs. *Second Avenue R.R. Co. v. Coleman*, 24 *Barb.* 300.

19. Demand Essential.—But a count in a complaint in such an action is bad, when it is not alleged that demand had been made on defendant; as a party receiving money for the use of another is rightfully in possession till the same is demanded. (*Reina v. Cross*, 6 *Cal.* 31; *Greenfield v. Steamer "Grinnell," Id.* 68; *Kohlman v. Wright, Id.* 231.) One who has received money, standing in the position of trustee, *e.g.*, a collecting agent, is in general not liable in an action for money received, until demand is made, or some breach of trust or duty committed. (*Walrath v. Thompson*, 6 *Hill.* 540.) As where a bank receives money, it cannot be sued till after it has been drawn for. (*Downes v. Phoenix Bank*, 6 *Hill.* 297.) But a deposit with a stakeholder, or an illegal wager, may be sued for without a previous demand, where the money has been paid over before the action. *Ruckman v. Pitcher*, 1 *N.Y.* 392; see the recent case of *Johnson v. Russel*, *Cal. Sup. Ct., Jul. T.*, 1869.

20. Other Parties.—A person, not an attorney, who collects a note at the request of another, is liable for the amount, after a reasonable time, without demand. *Hickok v. Hickok*, 12 *Barb.* 632.

21. Sub-Agents.—Money collected by a sub-agent may be recovered. (*Wilson v. Smith*, 3 *How. U.S.* 763.) Or money paid to an agent, if before it be paid to the principal notice be served upon the agent that it will be reclaimed. *Wood v. United States*, *Dev.* 55.

22. Sufficient Allegations.—A complaint which alleges that the defendant was employed as plaintiff's agent for the purchase of stock, that in settlement between the seller and defendant the former was found to be indebted to the latter, as the plaintiff's agent, in a certain sum, which he paid, but which the defendant refuses to pay to the plaintiff, states a sufficient cause of action. (*Bates v. Cobb*, 5 *Bosw.* 28.) A complaint against an agent for money received, who pre-

tends to have been robbed thereof, may properly allege simply that the defendant being in possession of the plaintiff's property as his agent, converted the same to his own use. (*Frost v. McCarger*, 29 *Barb.* 617.) That defendant, as such agent, had collected from divers persons divers sums, either stating the aggregate or asking an accounting is sufficient. *West v. Brewster*, 1 *Duer*, 647; S.C., 11 *N.Y. Leg. Obs.* 157.

23. Who may Recover.—Where an agent or servant applies money of his employer, in his hands, to discharge the debt of a third person, the employer may recover it from the payee as money received to his use, if the payee received it with a knowledge of the facts. *Amidon v. Wheeler*, 3 *Hill*, 137.

24. When Action Lies.—An action for money had and received is proper, when a recovery is sought of money which defendant has received, and refused to pay on demand to the plaintiff, who is entitled to it. *Stanwood v. Sage*, 22 *Cal.* 516.

No. 142.

iii. *The Same, Another Form.*

[TITLE.]

The plaintiff complains, and alleges:

I. That between the day of, 187., and the day of, 187., the defendant was the agent of the plaintiff in [*stating generally the employment*], that he collected and received, as such agent, from divers persons, certain sums of money, for and on account of the plaintiff, amounting in the whole to the sum of dollars; no part of which has been paid by defendant to the plaintiff.

II. That on the day of, 187., at, the plaintiff demanded payment of the same from the defendant.

III. That he has not paid the same.

[*Demand of Judgment.*]

25. Notes Received.—Under a complaint in an action against an agent for money had and received, the plaintiff may recover where it appears that the defendant received notes which were good and collectable, and by his transactions he released the debtor and deprived his principal of all remedy except against himself. 6 *Cov.* 183, *note*; 3 *Mass.* 403; 11 *John.* 464; *Allen v. Brown*, 51 *Barb.* 86.

No. 143.

iv. *For Money Received by Defendant, through Mistake.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of, 187., at, the plaintiff then intending to pay the defendant [one hundred] dollars, paid him [five hundred] dollars by mistake.

II. That the defendant has not repaid the sum so overpaid to him by plaintiff.

[*Demand of Judgment.*]

26. Demand.—Where money is paid by mistake, notice of the mistake, and demand of repayment before suit to recover it back, are not necessary. The party receiving the money under such circumstances is not a bailee or trustee. But such a demand may affect the question of interest. *Utica Bank v. Van Gieson*, 18 *Johns.* 485.

27. Mistake of Law.—Money paid by mistake of law cannot be recovered back, there being no difference between money paid in ignorance of law and money paid by mistake of law. *Schlesinger v. United States*, 1 *Nott. & H.* 16.

28. When the Action Lies.—That money paid under a mutual mistake of facts may be recovered back, see *Franklin Bank v. Raymond*, 3 *Wend.* 69; *Burr v. Veeder*, *Id.* 412; *Wheaton v. Olds*, 20 *Id.* 174; *Canal Bank v. Bank of Albany*, 1 *Hill*, 287; *Bank of Commerce v. Union Bank*, 3 *N.Y.* 230.

*No. 144.**v. For Price of Goods Sold by a Factor.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, he delivered to defendant [fifty barrels of flour], for sale upon commission.

II. That on the day of, 187. [*or* on some other day unknown to the plaintiff, before the day of, 187.], the defendant sold the said merchandise for dollars.

[III. That the commissions and expenses of the defendant thereon amount to dollars.]

IV. That on the day of, 187., the plaintiff demanded from the defendant the proceeds of the said merchandise.

V. That he has not paid the same.

[*Demand of Judgment.*]

29. Demand.—In an action against an agent for not accounting, etc., a request to account and pay over must be alleged and proved. (*Bushnell v. McCauley*, 7 *Cal.* 421.) The distinction, in respect to the necessity of proving a demand, between an action for not accounting, and an action for not paying over, discussed in *Cooley v. Betts*, 24 *Wend.* 203.

30. Demand should be Alleged.—An express demand should be alleged. • (*Baird v. Walker*, 12 *Barb.* 298; *Holden v. Crafts*, 4 *E. D. Smith*, 490; 2 *Abb. Pr.* 303.) In an action against a factor for the proceeds of goods sold, of which he apprised his principal, a demand must be shown, unless he had instructions to remit, or the usage of his busi-

ness made it his duty to do so without instructions. *Cooley v. Betts*, 24 *Wend.* 203; *Ferris v. Paris*, 10 *Johns.* 285; *Brink v. Dolsen*, 8 *Barb.* 337; *Holden v. Crafts*, 4 *E. D. Smith*, 490; *Baird v. Walker*, 12 *Barb.* 298.

31. Election of Remedy.—Under a complaint which contained a count for indebtedness from the defendant to the plaintiff, for property sold and delivered and money received to the plaintiff's use, the plaintiff may prove a tortious taking by the defendant, and the sale of the property by him, and the receipt of the money, and waiver of the tort, and sue for the money had and received, or for the value of the property, as for goods sold and delivered. If the wrong-doer sells the property, and receives the money therefor, an action lies at the suit of the owner for money had and received, and such an action is a waiver of the tort. (1 *Hill*, 234-240, *note a*; 2 *Seld.* 112; 27 *Barb.* 652.) In such an action, it is not necessary to state how, or under what circumstances, the money came to the defendant's hands. The receipt of the money to the plaintiff's use is the fact which constitutes the cause of action. 6 *Barb.* 458; 12 *How. Pr.* 326; 3 *Seld.* 476; *Harpending v. Shoemaker*, 37 *Barb.* 270; compare *Byxbie v. Wood*, 24 *N.Y.* 607.

32. Form of Action.—This form is drawn on the presumption that the factor has not accounted. If he has accounted, but not paid, the better form is on an "account stated." If he has not accounted, it is improbable that the plaintiff will know the precise amount of his expenses, and it is not necessary to credit him with them in the complaint. (*N.Y. Code Comm'rs*, *note*.) The third allegation is not essential, but may prevent any answer setting up his claim.

33. Goods Sent on Commission.—If the complaint in an action for the price of goods sent on commission, alleges that defendant sold, but did not account to plaintiff, the plaintiff must prove that a sale actually took place. *Elbourne v. Upjohn*, 1 *C. & P.* 572; *S.C.*, 11 *Eng. Com. L. R.* 476.

No. 145.

vi *Against Factor, for Price of Goods Sold on Credit.*

[TITLE.]

The plaintiff complains, and alleges;

I. That on the day of, 187., the plaintiff employed the defendant to sell certain goods and merchandise, of the value of dollars, upon commission, and delivered the same to the defendant, who then promised to sell them and be responsible to the plaintiff for the price thereof.

II. That on the day of, 187., as the plaintiff is informed and believes, the defendant sold said goods and merchandise for the sum of dollars, on a credit of months from that date, which credit expired before the commencement of this action.

III. That the commission and expenses of the defendant thereon amount to dollars.

IV. That plaintiff further alleges, on information and belief, that the sum of dollars is the price of said goods and merchandise, after deducting said charges.

V. That on the day of, 187., at, the plaintiff demanded of the defendant payment of said sum of dollars.

VI. That he has not paid the same.

[*Demand of Judgment.*]

34. Default of Purchaser.—It is unnecessary for the plaintiff to aver that the purchaser was in default, nor is it necessary to aver a

demand on him, though it might be otherwise if the factors guaranteed the payment of a price to be collected by the principal. 1 *Pars. on Cont.* 78; *Milliken v. Byerly*, 6 *How. Pr.* 214; *Wolff v. Koppell*, 2 *Den.* 268.

35. Demand.—The rule is settled in New York, that a foreign factor is not liable to an action for the proceeds of sales made by him for account of his principal on commission, until a demand made by the principal, or instructions to remit. *Walden v. Crafts*, 2 *Abb. Pr.* 301; *Holden v. Crafts*, 4 *E. D. Smith*, 490; *Ferris v. Paris*, 10 *Johns.* 285; *Murray v. Coster*, 20 *Id.* 576; *Loverick v. Meigs*, 1 *Cow.* 645; *Taylor v. Bates*, 5 *Id.* 376; *Lyle v. Murray*, 4 *Sandf.* 590; *Covley v. Betts*, 24 *Wend.* 203; *Hays v. Stone*, 7 *Hill*, 128; *Baird v. Walker*, 12 *Barb.* 298; *Lillie v. Hoyt*, 5 *Hill*, 395; *Heubach v. Rother*, 2 *Duer.* 227.

No. 146.

Against Broker, for Proceeds of Note Discounted.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff employed the defendant to negotiate a promissory note, the property of the plaintiff, made by one A. B., [*describe the note,*] and thereupon he delivered the same to the defendant, who undertook to negotiate the same for a reasonable commission, and to pay the proceeds over to the plaintiff.

II. The plaintiff further alleges, on information and belief, that on the day of, 187., the defendant procured said note to be discounted at the Bank, and received as the proceeds thereof the sum of dollars.

III. That the commission and expenses of the defendant thereon amount to

IV. That on the day of, 187., at, the plaintiff demanded of the defendant dollars, the balance of the proceeds of said note after deducting said expenses and commission.

V. That he has not paid the same.

[*Demand of Judgment.*]

33. Unauthorized Sale.—For selling without authority stock which the broker had purchased for the plaintiff, if this fact be shown in the complaint, and that it was to be delivered to him within a specified time at his option, but that he sold it meanwhile against his express instructions, a demand and tender on the part of the plaintiff need not be alleged. *Clark v. Meigs*, 13 *Abb. Pr.* 467.

CHAPTER X.

FOR MONEY LENT.

No. 147.

i. Lender against Borrower.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, he lent to the defendant dollars.

II. That the defendant has not paid the same.

Wherefore the plaintiff demands judgment for dollars, with interest from the day of, 187..

1. At his Request.—This may be omitted, upon the authority of the case of (*Victors v. Davis*, 1 *Dowl. & L.* 984.) Although it is necessary to prove a request in order to constitute a loan. (See *Brown v. Garnier*, 6 *Taunt.* 389.) But, in general, a request in such case will be implied. (See *Victors v. Davis*, 1 *Dowl. & L.* 984; see, also, in this connection, *Brown v. Garnier*, 6 *Taunt.* 389; S.C., 1 *Eng. Com. L. R.* 421;) where it was held that “hired” implies a request.

2. Debt, how Contracted.—In an action to recover money loaned, if the complaint charges the indebtedness, the manner in which it accrued, the promise to pay, and the refusal, it is sufficient. *Williams v. Glasgow*, 1 *New.* 533.

3. Debt, when Due.—It is not necessary to state when the debt was to be repaid, except for the purpose of fixing a date for interest. The presumption of law is, that it was to be paid immediately. (*Peets v. Bratt*, 6 *Barb.* 662.) Nor is it necessary to show that the debt was due at the commencement of the action. If it was not, that is matter of defense, to be set up in the answer. *Smith v. Holmes*, 19 *N.F.* 271.

4. Demand.—Where the count, in an action for money lent and advanced, sets forth a demand for a certain sum, and the jury find a verdict for a larger sum, it is not erroneous, if the declaration covered the larger sum in the *ad damnum*. *Mill v. Bank of the United States*, 11 *Wheat.* 431.

5. Non-Payment.—It may be doubted whether the allegation of non-payment is necessary. See *Lanning v. Carpenter*, 20 *N.F.* 458; *McKyring v. Bull*, 16 *N.F.* 297.

6. Payments Made on Account.—The plaintiff need not state payments made on account, as this is matter of defense. But where the complaint is verified, there is a necessity to do so; and in such case he should briefly state what amount has been paid. (*Van Demark v. Van Demark*, 13 *How. Pr.* 372; *Giles v. Betz*, 15 *Abb. Pr.* 285.) As any payments must be pleaded, it is certain that the most general form of averring non-payment is sufficient. It is not necessary to add “or any part thereof.” Although not necessary, it is highly proper to credit the defendant with any payments.

7. Special Request.—Where a special request is necessary to be averred, the general allegation, “though often requested,” is not

enough. (*Bush v. Stevens*, 24 *Wend.* 256; *Whitton v. Whitton*, 38 *N.H.* 187.) An allegation that he "refused, etc., though then and there particularly requested so to do," is a sufficiently explicit allegation of a request. (*Supervisors of Alleghany v. Van Campen*, 3 *Wend.* 48.) Wherever a request is essential to the defendant's liability, it must be averred. *Spear v. Downing*, 34 *Barb.* 522; 12 *Abb. Pr.* 437.

8. What must be Shown.—The declaration set out a draft drawn by defendants on a house in Boston, which it avers was drawn with the understanding that plaintiff should pay the same, but did not aver that after paying the draft, he canceled it, and delivered it up to the defendant. *Held*, that the defects were fatal in this form of action. *Lambert v. Slade*, 3 *Cal.* 330.

No. 148.

ii. *The Same, no Time for Payment Agreed on.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., he loaned the defendant, for his accommodation, and at his request, and without any time being agreed on for repayment, the sum of dollars.

II. That he has demanded payment of the same, which the defendant refused and still refuses and neglects to pay.

[*Demand of Judgment.*]

No. 149.

iii. *By Assignee of Lender Against Borrower.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at

....., the defendant was indebted to one A. B., in the sum of dollars, on an account for money lent by said A. B. to the defendant.

II. That on the day of, 187., at, the said A. B. assigned said indebtedness to the plaintiff, of which assignment defendant had due notice.

III. That he has not paid the same.

[*Demand of Judgment.*]

9. Form of Action.—This form of complaint should only be employed in cases where the items of the claim are embraced in an account. (*Allen v. Patterson*, 8 *N.Y.* 476.) For authorities in support of the above form, consult *Freeborn v. Glazier*, 10 *Cal.* 337; *De Witt v. Porter*, 13 *Id.* 171; *Beekman v. Platner*, 15 *Barb.* 550; *Merwin v. Hamilton*, 6 *Duer*, 244; *Second Avenue R.R. Co. v. Coleman*, 24 *Barb.* 300; see 1 *Abb. Pr.* 106; and 7 *N.Y.* 476; *Tucker v. Rushton*, 7 *N.Y. Leg. Obs.* 315; 2 *Code R.* 59.

10. Sufficient Allegation of Assignment.—An allegation that the third person “assigned, sold, and set over to the plaintiff the said judgment,” sufficiently alleges an absolute assignment, and the consideration for the assignment need not be stated. *Martin v. Kanouse*, 2 *Abb. Pr.* 330.

11. Where Suit is not on an Account.—Where the action is not on an account, this complaint may be obnoxious to a motion to make it more definite and certain, if defendant is prejudiced by its want of particularity. (*Eno v. Woodward*, 4 *N.Y.* 249; see, also, 8 *How. Pr.* 83; 9 *Id.* 78; *Chesborough v. N.Y. and Erie R.R. Co.*, 13 *Id.* 557; *Id.* 360; *Hall v. Southmayd*, 15 *Barb.* 32.) But not necessarily so. *Adams v. Holley*, 12 *How. Pr.* 326; *Dows v. Hotchkiss*, 10 *N.Y. Leg. Obs.* 281.

*No. 150.**iv. Partners Lenders, Against Partners Borrowers.*

[TITLE.]

A. B. and C. D., the plaintiffs, complain of E. F. and G. H., the defendants, and allege:

I. [*Allege partnership as in Form 69.*]

II. That on the day of, 187., at, the plaintiffs loaned to the defendants the sum of five hundred dollars, on condition that it should be repaid on demand, with interest from that date, at per cent. per month.

III. That plaintiffs have demanded payment thereof.

IV. That defendants, or either of them, have not paid said sum, and the interest, or any part thereof.

Second.—And for a second cause of action, the said plaintiffs allege:

I. That on the day of, 187., at, the plaintiffs, at the special instance and request of the said defendants, paid, laid out, and expended for the said defendants, and to and for their use and benefit, the sum of five hundred dollars; in consideration whereof, the said defendants promised the said plaintiffs to pay unto the said plaintiffs the sum of five hundred dollars on demand, together with interest thereon.

II. That on the day of, 187., at, the plaintiffs demanded payment thereof.

V. That defendants, or either of them, have not paid the same, the interest, or any part thereof; except, etc. [*State briefly the total payments.*]

[*Demand of Judgment.*]

CHAPTER XI.

FOR MONEY PAID.

No. 151.

- i. *For Money Paid to a Third Party at Defendant's Request.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, at the request of defendant, plaintiff paid to one A. B. dollars,

II. That in consideration thereof, defendant promised to pay the same to plaintiff.

[III. That on the day of, 187., the plaintiff demanded payment of the same from the defendant, but he has not paid the same.]

[*Demand of Judgment.*]

1. Amount Stated.—Where the plaintiff in an action omitted to state the amount of money advanced and sought to be recovered, the defect is not cured by a bill of sale filed with the petition, though it contains a statement of the amount advanced. *Allen v. Shortridge*, 1 *Duwall* (Ky.) 34.

2. Demand.—No demand is necessary. It is inserted here only as an example of the mode of alleging demand when it is desired to fix a date for the commencement of interest.

3. Fraud.—In an action to recover back money received by the

defendant from the plaintiff, words in the complaint charging fraud may be regarded as matter of inducement. The fraud need not be proved. (*Harpending v. Shoemaker*, 37 *Barb.* 270.) Money fraudulently received from a bank may be sued for before the note given to the bank becomes due. (*Gibson v. Stevens*, 3 *McLean*, 551.) Or money received on a prize drawn by fraudulent means in a lottery. *Catts v. Phalen*, 2 *How. U.S.* 376.

4. Promise.—This allegation is not *absolutely* necessary, as the law will imply a promise; but as an express promise is almost always made in such cases, it is better to state it. If no express promise is made, none should be pleaded. See *Farron v. Sherwood*, 17 *N.Y.* 230; see, also, *Berry v. Fernandes*, 1 *Bing.* 338; *Durnford v. Messiter*, 5 *Man. & Sel.* 446.

5. Promise in Writing.—Our statute especially prescribes that "every special promise to answer for the debt, default, or miscarriage of another," is void if not in writing. (*Gen. Laws of Cal.* ¶ 3,156.) But it need not be alleged in the complaint that the promise was "in writing." See p. 225, Note 77.

6. Trustee of Express Trust.—Where a third person receives money due from a debtor to his creditor, and does not pay it over to the creditor, in consequence of which the creditor brings an action against the debtor and recovers his demand, the debtor may sue such third person to recover back the former payment. *Priest v. Price*, 3 *Keyes*, 222.

No. 152.

ii. *By one having Paid Debt of Another, to be Repaid on Demand.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, he paid to the use of the defendant, at his request, and on condition that the same should be repaid on demand, the sum of dollars, to one A. B., for one quarter's rent of the house then occupied by the defendant [*or state the character of the debt*].

[II. That the plaintiff, on the day of, 187., at, demanded payment of the same from the defendant.]

III. That defendant has not paid the same.

[*Demand of Judgment.*]

7. Demand.—The allegation of demand is not in general necessary, except for the purpose of fixing the time for interest thereon.

8. Request.—An averment of request is necessary in a complaint for money paid. (2 *Greenl. Ev.* 93.) But it may be either express or implied; and if implied, the facts raising it must be alleged.

No. 153.

iii. *The Same—to be Repaid on a Specified Day.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, he paid to the use of the defendant, and at his request, the sum of dollars, to one A. B., the amount of a promissory note made by the defendant.

II. That defendant promised to repay said sum, with interest, to this plaintiff, on the day of, 187..

III. That he has not paid the same.

[*Demand of Judgment.*]

9. Legal Liability.—The defendant's legal liability to pay the debt which plaintiff has paid, is an essential fact in an action to recover the money paid, unless there be an express promise by defendant to repay the plaintiff. 2 *Greenl. on Ev.* 103, § 114, n.

*No. 154.**iv. For Repayment of Money Paid on a Reversed Judgment.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the day of, 187., judgment was rendered against this plaintiff in the District Court, County of, State of California, in an action wherein the defendant was plaintiff, and this plaintiff was defendant, for the sum of dollars.

II. That on the day of, 187., at, the plaintiff paid to the defendant the sum of dollars, in satisfaction thereof.

III. That afterwards, on the day of, 187., by the judgment of the Supreme Court of the State of California, said first mentioned judgment was reversed; but that no part of the said sum paid in satisfaction thereof has been repaid to this plaintiff.

[Demand of Judgment.]

10. Action.—That money paid on a reversed or suspended judgment may be recovered back, see *Raun v. Reynolds*, 18 *Cal.* 275.

11. Judgment Reversed.—It must be shown that the judgment was reversed; it cannot be stated as erroneous. (*Bank of Washington v. Bank of U.S.*, 4 *Cranch*, 86; compare *McDaniel v. Riggs*, 3 *Cranch*, 167; *Bank of Washington v. Neale*, 4 *Cranch*, 627; *Walker v. Ames*, 2 *Cow.* 428; *White v. Ward*, 9 *Johns.* 232; *Roth v. Schloss*, 6 *Barb.* 308.) But if a new trial be ordered, it is sufficient. (*Sturgis v. Allis*, 10 *Wend.* 355.) An action lies to recover back money paid under the award of a public officer, when such award was obtained by fraud

and imposition, and where the payment was made before discovering the fraud. *Michigan v. Phoenix Bank*, 33 *N.P.* 9; modifying same case, 7 *Bosw.* 20.

No. 155.

v. Bv Broker, for Money Advanced on Account of his Principal.

[TITLE.]

The plaintiff complains, and alleges :

I. That the plaintiffs are partners, doing business in the City of, as brokers, under the firm name of A. B. & Co.

II. That, as brokers, on or about the day of, 187., they purchased for and on account of the defendant, and at his request, the following goods, wares, and merchandise: [*designate them*—said goods, wares, and merchandise to be paid for by the defendant at the expiration of days from the day of purchase, with the right to the defendant to pay for said goods, wares, etc., at any time before the expiration of said days.

III. That it is the custom of brokers in such cases to purchase the goods in their own names, without disclosing the name of their principal, and in case of the failure of the principal to pay for the same, to resell the goods on the account of the principal.

IV. That on the day of, 187., at, the plaintiffs offered to deliver said goods, wares, and merchandise to the defendant, and demanded of him payment for the same.

V. That on or about the day of, 187., the defendant paid to the plaintiffs, on account of

the said purchase of goods, wares, etc., dollars.

VI. That at the expiration of the said days, the defendant failed to pay the balance due for said goods, and the plaintiffs paid for the same, and to reimburse themselves, sold the same on his account, at [*state the price*].

[*Demand of Judgment.*]

12. Custom of Brokers.—It is well to set forth the custom of brokers in such transactions. (*Whitehouse v. Moore*, 13 *Abb. Pr.* 142.) A custom of insurance brokers to take dividends declared by mutual companies in lieu of all other compensation, is bad. *Minnesota C. R. R. Co. v. Morgan*, 52 *Barb.* 217.

13. Demand.—The plaintiff must aver that he demanded payment of the price, and offered to deliver the goods. *Merwin v. Hamilton*, 6 *Duer*, 244.

No. 156.

vi. *For Repayment of Deposit on Purchase of Real Estate.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the plaintiff and the defendant made their contract in writing, subscribed by them, whereby it was mutually agreed that the said defendant should sell to this plaintiff, and the plaintiff should buy from the defendant, certain real estate, [*describe it,*] for the sum of dollars, to be paid by the plaintiff; that the defendant should make a good title to the said premises, and deliver a deed thereof on the day of, 187.; and that the plaintiff should thereupon pay to the said defendants the said purchase-money.

II. That the plaintiff, as a security, as well for the performance of said agreement on his part, as to secure a performance thereof on the part of the defendant, then and there deposited in the hands of said defendant the sum of dollars, as part of said purchase-money, to be to and for the use of the defendant, and to be retained by him on account of the purchase-money, if the plaintiff should complete his purchase and receive the deed; but to be to and for the use of the plaintiff, and to be returned to him, if the defendant should fail to fulfill his agreement, to give a deed at the time and pursuant to the agreement.

III. That he has always been ready and willing to do and perform everything in the agreement contained on his part, and on the said day of, 187., was ready and willing, and offered to the defendant to accept and take the deed of the premises pursuant to the agreement, and to pay to him the balance of the purchase-money due therefor.

IV. That the defendant did not on said day of, 187., nor at any time since, give him a deed of the premises pursuant to the agreement, but refused to do so.

V. That on the day of, 187., he demanded of the defendant payment of the sum of dollars, deposited with him as aforesaid.

VI. That defendant has not paid the same.

[*Demand of Judgment.*]

14. City Property.—Where the sale of the city's property was without authority, the plaintiff is not required to surrender the property before bringing an action for recovery back of the purchase money.

(*McCracken v. San Francisco*, 16 *Cal.* 591.) He is not required to transfer either the property or the possession to the corporation before the commencement of the action. *Herzo v. San Francisco*, 33 *Cal.* 134.

15. Contract.—Such an agreement is material, and the covenants are dependant on each other. *Green v. Reynolds*, 2 *Johns.* 207; *Jones v. Gardiner*, 10 *Id.* 266; *Gazley v. Price*, 16 *Id.* 267; *Hardin v. Kretzinger*, 17 *Id.* 293; *Parker v. Parmele*, 20 *Id.* 130; *Morris v. Sliter*, 1 *Den.* 59.

16. Demand of Judgment.—The plaintiff may recover interest on the deposit money recovered, from the time of demand. (*Farquhar v. Farley*, 7 *Taunt.* 592.) And on money in his hands lying idle, ready to complete the contract. (*Sherry v. Oke*, 3 *Dowl. Pr. C.* 349.) And special damages for search of title. *Jones v. Littledale*, 6 *Ad. & E.* 486.

17. Fraudulent Sale.—Where plaintiff bought a lot and paid taxes thereon, and afterwards discovered that the defendant had previously sold it, and the defendant knew of this former conveyance, and that the money was fraudulently obtained, the procurement by defendant of a full title to the lot will not bar the plaintiff's recovery of the purchase money and interest. *Alvarez v. Brannan*, 7 *Cal.* 503.

18. Offer to Perform.—An offer to perform is necessary; mere readiness is not sufficient. *Lester v. Jewett*, 11 *N.Y.* 453; *Williams v. Healey*, 3 *Den.* 363; *Johnson v. Wygant*, 11 *Wend.* 48.

19. Performance.—It is necessary for the plaintiff to aver his readiness and willingness to fulfill at the time and place agreed. (*Porter v. Rose*, 12 *Johns.* 209.) But the purchaser is not bound to make an absolute tender of performance; a conditional offer to perform is sufficient. *Robb v. Montgomery*, 20 *Johns.* 15; *West v. Emmons*, 5 *Id.* 179; *Topping v. Root*, 5 *Cow.* 404; *Rawson v. Johnson*, 1 *East*, 203; *Waterhouse v. Skinner*, 2 *Bos. & P.* 447; *Miller v. Drake*, 1 *Cal.* 45; *Bellinger v. Kilts*, 6 *Barb.* 273.

20. Purchase Money.—To recover back purchase money on the ground of a breach of covenant, the complaint must allege a breach of covenant. *Wills v. Prim*, 21 *Tex.* 380.

21. Purchase from Agent.—Where a party makes a purchase from an innocent agent, who afterwards parts with the money of his

principal, and it afterwards transpires that such purchase avails the purchaser nothing, no right of legal complaint lies against the agent. *Engels v. Heatly*, 5 *Cal.* 135.

22. Reasonable Time.—The bringing of the action is not, however, a sufficient demand. A conveyance should be demanded and refused, and a reasonable time allowed for its execution. *Fuller v. Hubbard*, 6 *Cow.* 13; *Hackett v. Huson*, 3 *Wend.* 249; *Connell v. Pierce*, 7 *Id.* 128; *Foote v. West*, 1 *Den.* 544; *Sutweller v. Linnell*, 12 *Barb.* 512; to the contrary are, *Driggs v. Dwight*, 17 *Wend.* 71; *Flynn v. McKéon*, 6 *Duer*, 203; *Carpenter v. Brown*, 6 *Id.* 147.

23. Rescission by Vendee.—Upon failure of the vendor to be ready with the deed, and convey a good title, on the day agreed, the vendee may rescind the contract, and recover back the deposit. (11 *Johns.* 525; *Sugd. on Vendors*, 359; *Van Benthuyzen v. Crapser*, 8 *Johns.* 257; *Benedict v. Lynch*, 1 *Johns. Ch.* 70; *Cornish v. Rowley*, 1 *Selw. N. P.* 179; *Dominick v. Michael*, 3 *Sandf.* 374.) And a demand of the deposit is a rescission. (*Id.*) And if on demand the vendor positively refuses, no further demand is necessary. *Blood v. Goodrich*, 9 *Wend.* 68.

24. Sale by Auction.—Upon a sale by auction, if the vendor fails to complete the contract, the deposit may be recovered from the auctioneer as stakeholder. (*Lee v. Munn*, 1 *Moore*, 481; *Curling v. Shuttleworth*, 6 *Bing.* 121; *Berry v. Young*, 2 *Esp.* 641; *Babington on Auctions*, 173.) And if he fail to disclose his principal, he is liable for damages as well. *Hanson v. Robardeau*, *Peakes N. C. P.* 120; *Ken's Comm.* 630, 631; *Mauri v. Hefferman*, 13 *Johns.* 58; *Bk. of Rochester v. Monteath*, 1 *Den.* 402. *Mills v. Hunt*, 20 *Wend.* 431.

25. When Action will not Lie.—Where a purchaser at a sale under a decree in foreclosure suit, which decree was void, because grantee of the mortgagor was not made a party, an action will not lie to recover back the money paid them on his bid. *Boggs v. Hargrave*, 16 *Cal.* 559.

*No. 157.*vii. *To Recover Back a Wager.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of, 187., at, the plaintiff deposited in the hands of the defendant, as stakeholder, dollars, which was to abide the event of a wager made between the plaintiff and one A. B., on the result of [*here state what, as election, race or otherwise*].

II. That such wager was in violation of the statute entitled: "An Act," etc. [*title of act*], passed, and the acts amendatory thereof and supplementary thereto.

III. That no decision has as yet been rendered upon said election [*race, or otherwise*].

IV. That thereby an action accrued to plaintiff, according to the provisions of said act.

[*Demand of Judgment.*]

26. **Actions.**—There seems to be no satisfactory reason for the distinction, as made by the English cases, between actions directly between the parties to the wager, and actions between the loser of a bet and the stakeholder, if one has been employed. (*Johnston v. Russel, Cal. Sup. Ct., Jul. T., 1869.*) An action to recover back money lost at play, is not an action for a penalty or forfeiture. (*Arrietta v. Morrissey, 1 Abb. Pr. (N.S.) 439.*) The complaint in such action must be special, setting out the facts, and bringing the plaintiff within the statute by force of which he claims to recover. (15 *Johns.* 5; *Moran v. Morrissey, 18 Abb. Pr. 131.*) Where an act makes wagers on horse races and the holding of stakes criminal offenses, one who has deposited money with a stakeholder cannot recover it, although the race has not come off. *Sutphin v. Crozer, 3 Vroom. 462*; see *Bybee v. Burbank, 2 Oregon, 295.*

27. Demand.—An action against a stakeholder, to recover money deposited on an illegal wager, may be maintained without previous demand, when the money has been paid over before the action. (*Ruckman v. Pitcher*, 1 *N.Y.* 392.) In such an action interest is recoverable from the time of demand, *e.g.*, from the commencement of the action. *Ruckman v. Pitcher*, 20 *N.Y.* 9; and 13 *Barb.* 556.

28. Facts must be Averred.—The complaint is obnoxious to a motion that it be made more definite and certain, unless it states the facts necessary to show clearly under which section of the statute the action is brought. (*Arrietta v. Morrissey*, 1 *Abb. Pr. (N.S.)* 439.) As the remedy in such action is given by statute, he must by his complaint bring himself within its provisions. (4 *J. R.* 193; 3 *W. R.* 494; *Langworthy v. Broomley*, 29 *How. Pr.* 92.) The count in a complaint stating that, on a day named, the defendant received a specified sum belonging to or on account of the plaintiff, and which is now due, being contrary to the provisions of the statute designating it, is not demurrable for not stating facts sufficient to constitute a cause of action. *Betts v. Bache*, 9 *Bosw.* 614.

29. Form.—For another form, consult *O'Malley v. Reese*, 6 *Barb.* 658; *Collins v. Ragrew*, 15 *Johns.* 5; *Cole v. Smith*, 4 *Id.* 193; *Betts v. Bache*, 14 *Abb. Pr.* 279; *People v. Bennett*, 5 *How. Pr.* 384.

30. Kansas.—In Kansas, money placed in the hands of a stakeholder, on an illegal bet on elections, may be recovered by the depositor, on demand, at any time before it is paid over to the winning party. *Reynolds v. McKinney*, 4 *Kansas*, 94; *Jennings v. Reynolds*, 4 *Kansas*, 110.

31. Limitation of Right to Recover.—If the parties to an illegal wager repent, and desire to withdraw before the wager has been decided, let them be encouraged to do so, by allowing them to recover their stakes from each other or from the stakeholder. But persons who allow their stakes to remain until the bet has been decided, are entitled to no such consideration. (*Johnston v. Russel*, *Cal. Sup. Ct., Jul. T.*, 1869.) After the money has been lost and won, neither party ought to be heard in a court of justice. *Id.*

32. Michigan.—In Michigan, money lost at play or on a horse race, may be recovered as money had and received. *Grant v. Hamilton*, 3 *McLean*, 100.

33. Necessary Averments.—In an action to recover money lost at play, since the statute gives the action only for losses exceeding twenty-five dollars at one sitting, and requires it to be brought within three months after payment, the defendant is entitled to require the plaintiff to specify in his complaint the amount lost at each sitting, and the time of payment. It is not sufficient that these facts might be called forth by requiring a bill of particulars. *Arrietta v. Morrissey*, 1 *Abb. Pr. (N.S.)* 439.

No. 158.

viii. *By Landlord, against Tenant, for Repayment of Tax.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and the defendant entered into an agreement, of which the following is a copy: [*Set forth lease, or agreement.*]

II. That there was duly levied and assessed upon said premises for the year 187., and while the covenants of the aforesaid agreement were in full force, and the defendant in possession of the premises by virtue thereof, a tax of dollars, which the defendant neglected to pay.

III. That by reason thereof, the plaintiff was, on the day of, 187., compelled to pay the said sum of dollars, with dollars arrearages of interest, and per cent., amounting in the whole to dollars.

IV. That defendant has repaid no part thereof to the plaintiff.

[*Demand of Judgment.*]

34. Demand.—The lessor's right of action is perfect with a previous demand of the tenant. *Garner v. Hannah*, 6 *Duer*, 262.

35. Illegal Taxes.—In an action to recover back illegal taxes, it is not sufficient to aver that the valuation of the property is "unjust, disproportioned, and unequal." The complaint must state specifically wherein it is so. *Guy v. Washburn*, 23 *Cal.* 111.

No. 159.

ix. *Against Carrier, to Recover Money in Excess for Freight.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant agreed with the plaintiff to transport from to, and to deliver to him, certain goods of the plaintiff, for the sum of dollars.

II. That the said sum of dollars was a reasonable sum to be paid therefor.

III. That the defendants entered upon the performance of said agreement, and transported said goods.

IV. That on the arrival of said goods, the plaintiff demanded said goods of the defendant, and was ready and willing, and offered to pay to the defendants for transporting the same, the said sum of dollars.

V. That the defendant refused to deliver said goods to the plaintiff, unless he would pay to the defendant dollars for transporting the same.

VI. That on the day of, 187., at, the plaintiff paid dollars to the defendant to obtain delivery of said goods, which sum he

paid under protest, and expressly denying the defendant's right to claim it, and otherwise performed all the conditions of said agreement on his part.

VII. That defendant has not repaid the same.

[*Demand of Judgment.*]

36. Concurrent Acts.—Delivery of freight by the carrier, and payment of freight-money by the owners, are concurrent acts, and neither party is bound to perform his part of the shipping contract unless the other is ready to perform the correlative act. (*Frothingham v. Jenkins*, 1 *Cal.* 42.) The owners of the cargo advanced money to the master, and the master gave a receipt promising to pay the amount out of the freight. *Held*, that this was a loan, and not an advance of freight. The “*Karnak*,” *Law Rep.* 2 *Adm. & Ecc.* 289.

No. 160.

x. *To Recover Back Freight on Failure of Carriage.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant agreed with the plaintiff to transport from to, and to deliver to him, certain goods of the plaintiff, for the sum of dollars.

II. That on the day of, 187., the plaintiff paid to the defendant the sum of dollars, as an advance payment for said transportation, and otherwise performed all the conditions of said agreement on his part.

III. That the defendant has not transported said goods, nor delivered the same to the plaintiff.

IV. That on the day of, 187., at, the plaintiff demanded of the defendant repayment of said sum of dollars advanced.

V. That he has not repaid the same.

[*Demand of Judgment.*]

37. Advanced Freight.—Freight paid in advance for transportation of goods, is to be repaid in the event of their not being carried, unless there be a special agreement to the contrary. (3 *Johns.* 339; 1 *Camp. R.* 84; 5 *Sandf.* 578; *Griggs v. Austin*, 3 *Pick.* 23; *Sampson v. Ball*, 4 *Dall.* 459; *Giles v. Brig "Cynthia,"* 1 *Pet. Admr. R.* 203; *Chinot v. Barker*, 2 *John.* 346; *Gillan v. Simkin*, 4 *Camp.* 241; *Harris v. Rand*, 4 *N.H.* 259, 555; 3 *Kent's Com.* 226.) This rule is not subject to any usage to the contrary. (1 *Sandf.* 149; 2 *Johns.* 327; 1 *Hall*, 619; 8 *N.Y.* 195; *Anth. N. P.* (2 *Ed.*) 80; *Emery v. Dunbar*, 1 *Daly*, 408.) Advanced freight can be recovered back by the charterer, in case of the loss of the ship, or non-performance of the voyage, whether by fault of the master or not. *Lawson v. Worms*, 6 *Cal.* 365.

38. Contract Generally.—Contracts for carrying freight form no exception to the general law, that where money is paid for an act to be done by another, and the act is not done, the money may be recovered back. *Reina v. Cross*, 6 *Cal.* 29.

39. Non-Performance.—Where money is paid by one person, in consideration of an act to be done by another, and the act is not performed, the money so paid may be recovered back. *Reina v. Cross*, 6 *Cal.* 31; see *Taylor v. Beavers*, 4 *E. D. Smith*, 215.

*No. 161.*xi. *By Surety, against Principal.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, a judgment was [duly] rendered in the Court of, against the defendant, in favor of one, for [dollars], from which the said defendant appealed.

II. That on the day of, 187., at the request of defendant, the plaintiff executed an undertaking, a copy of which is hereto annexed.

III. That on the day of, 187., the said judgment was affirmed by the Supreme Court of this State, with dollars costs and damages.

IV. That on the day of, 187., the plaintiff paid dollars, upon the said undertaking, to the said

V. That the defendant has not paid the same to plaintiff.

[*Demand of Judgment.*]

[*Annex Copy of the Undertaking.*]

40. Legal Liability.—Unless there is a special promise, the defendant's legal liability to pay is an essential fact. 2 *Greenl. Ev.* 103.

41. Rights of Surety.—The rights of sureties, as against principals and co-sureties, discussed in 1 *Pars. on Cont.* 33; *Pars. Merc. L.* 39; *Baker v. Martin*, 3 *Barb.* 642.

42. Surety, Action by.—In a suit by a surety against his principal, to recover back money paid by him on a judgment against him for the debt of his principal, a transcript of the judgment need not be annexed to the complaint. *Harker v. Glidewell*, 23 *Ind.* 219.

43. Undertaking.—Where a defendant undertook to pay any judgment which M. might recover against L., and the plaintiff undertook to save him harmless from such payment to the extent of five hundred dollars, which sum he deposited with the defendant for that purpose, the relation of principal and surety did not exist between them. Under these circumstances, the deposit could not become the money of the defendant till he had paid the judgment, and the plaintiff is entitled to recover the money on the payment or release of the judgment. *Solomon v. Reese*, 34 *Cal.* 35.

No. 162.

xii. For Repayment of Advances on Services.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant entered into an agreement, whereby the plaintiff agreed to hire, and the defendant agreed to render his services to the plaintiff, as, for the term of, in consideration of the sum of dollars, to be paid therefor by the plaintiff.

II. That on the day of, 187., at, the plaintiff paid to the defendant as an advance for his services, to be rendered thereafter, in pursuance of said agreement, the sum of dollars.

III. That the defendant wholly neglected and refused to render said services.

IV. That the defendant has not repaid the same.

[Demand of Judgment.]

44. Acceptance of Order.—The acceptance of an order to pay money, to be deducted from a payment to become due under a contract for work to be performed, is a promise to the payee, and the payee may recover thereon under the common money counts. 1 *Hill*, 84; 1 *Hill*, 585; 2 *H. Bl.* 241; 12 *Johns.* 278; 17 *Wend.* 206; McClellan v. Anthony, 1 *Edm.* 284.

45. Non-Performance.—The plaintiff must allege and prove non-performance. (*Wheeler v. Board*, 12 *Johns.* 363.) And if the defendant has rescinded, plaintiff need not prove readiness to pay the whole contract price. *Main v. King*, 8 *Barb.* 535.

46. Rescinded Contract.—Where an agreement has been rescinded on a contract for services, or performance so neglected as to entitle the plaintiff to rescind, a demand is not necessary to enable plaintiff to recover back advances. *Raymond v. Bearnard*, 12 *Johns.* 274; and see *Utica Bank v. Van Giesen*, 18 *Id.* 485.

47. Sufficient Allegations.—In a complaint for money expended and services performed, technical words, the meaning of which is long established, rather than phrases of doubtful import, should be used. The complaint ought to state that the money was expended *for the use and benefit* of defendant, and at his *instance and request*. So, in regard to the performance of labor. *Hugnet v. Owen*, 1 *Nev.* 464.

48. Void Contract.—If money has been paid, or services rendered, in the performance of the conditions of a void contract, by one party thereto, and the other party fails to voluntarily perform on his part, the injured party has no remedy at law upon the contract. He may, however, under such circumstances, disaffirm such contract, and maintain his action at law to recover back money so paid, or the value of services so rendered. *King v. Brown*, 2 *Hill*, 287; *Baldwin v. Palmer*, 10 *N.Y.* 234; *Fuller v. Reed*, *Cal. Sup. Ct., Jul. T.*, 1869.

CHAPTER XII.

FOR SERVICES, WORK, AND LABOR.

No. 163.

i. *For Services, at a Fixed Price.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, the defendant hired him as [clerk, *or otherwise*], at a salary of dollars per month.

II. That from the said day of, 187., until the day of, 187., the plaintiff served the defendant as [his clerk].

III. That the defendant has not paid the said salary [*or that no part of said salary has been paid, except, etc.*]

[*Demand of Judgment.*]

1. Demand.—No demand is necessary. Bringing the action is a sufficient demand on a contract to pay generally, and without time or terms specified. It is a debt payable when the services are performed, and no previous demand of payment is required. *Lake Ontario R.R. Co. v. Mason*, 16 *N.Y.* 451; *Ernst v. Bartle*, 1 *Johns. Cas.* 319.

2. Entire Contract.—Where a person agrees to work for a certain period, at a certain price, or to perform certain services for such an amount, he cannot break off at his own pleasure, and sue upon the contract for the work so far as he has gone. (*Hutchinson v. Wetmore*, 2 *Cal.* 311.) In such a case, performance is a condition precedent to

payment. (*Id.*) In a suit to recover for services for half a year, under a contract to work a whole year, plaintiff having quit, it requires slight evidence of assent or agreement to apportion the contract and allow plaintiff to recover. (*Hogan v. Titlow*, 14 *Cal.* 255.) See "*Further Employment*," Subd. Third, Chap. 4. A contract may be entire where payment is stipulated to be made monthly, where a note was to be given by the employer for the last four months' labor yet to be done, on a contract of eight months duration. (*Hutchinson v. Wetmore*, 2 *Cal.* 311.) Where one is employed by another under a contract, at a stated salary, payable monthly or at a stated time, as clerk or business agent, and the employee neglects his business, the employer is not precluded from suing for damages for neglect, by payment in full of employee's wages, or by not setting up a counter claim in an action by employee for his wages. (*Stoddard v. Treadwell*, 26 *Cal.* 294.) Where a party contracts, for a consideration in money, to find a purchaser for certain lands, it is a contract of employment, and not a contract for the sale of land within the meaning of the Statute of Frauds. (*Heyn v. Phillips*, *Cal. Sup. Ct., Jul. T.*, 1869.) But where a part of the remuneration was to be land, the contract was entire, and if void as to part under the Statute of Frauds, is void *in toto*, and could not be enforced. (*Lexington v. Clark*, 2 *Ventr.* 223; *Chater v. Bickett*, 7 *Tenn.* 201; *Crawford v. Morrill*, 8 *John.* 255; *Van Alstine v. Wimple*, 5 *Con.* 164.) But if services have been performed on such a void contract, the injured party may disaffirm the contract, and maintain his action at law for services rendered. *King v. Brown*, 2 *Hill*, 287; *Baldwin v. Palmer*, 10 *N.P.* 234; *Fuller v. Reed*, *Cal. Sup. Ct., Jul. T.*, 1869.

3. Extra Pay.—An express agreement for extra pay must be shown where a party works for a monthly salary. *Cany v. Halleck*, 9 *Cal.* 198.

4. Form of Complaint.—A declaration for labor done or services performed, generally, without specifying them in particular, is good. *Edwards v. Nichols*, 3 *Day*, 16; compare *Willamette Falls Transportation Co. v. Smith*, 1 *Or.* 171.

5. Joint Services.—Where two persons are employed by a claimant of a tract of land to procure a confirmation of the same, such service is not joint, and a separate action may be maintained by such agents for their expenses thus incurred. *Conner v. Hutchinson*, 12 *Cal.* 126.

6. Jurisdiction.—A British seaman on board a British vessel of

which a British subject is master, may, when discharged by the master in a port of the United States, without any fault on the part of the seaman, sue for and recover his wages in a state court. *Pugh v. Gillam*, 1 *Cal.* 485.

7. Performance of Conditions.—If the contract contains special provisions as to the mode of performance, the proper mode of declaring is still on the contract itself, and not on the general counts, setting it out at length, or in substance, with proper averments, to show that the conditions to the plaintiff's right of recovery have all been complied with. *Adams v. Mayor etc. of N.Y.*, 4 *Duer*, 295; *Atkinson v. Collins*, 30 *Barb.* 430; *S.C.*, 9 *Abb. Pr.* 353; *Brown v. Colie*, 1 *E. D. Smith*, 265.

8. Services of a Substitute.—The plaintiff may recover for work and services done by his substitute, under a contract made by defendant with him, provided that the services of a particular person were not contracted for, and that no other person could, under the contract, fill the place of the employee. (*Leet v. Wilson*, 24 *Cal.* 398.) Under a general complaint for work and labor, the plaintiff may recover on proof of a special contract fully completed. (7 *N.Y.* 476; *Hurst v. Litchfield*, 39 *N.Y.* 377.) Where there is a special contract between principal and agent, by which the entire compensation is regulated and made contingent, there can be no recovery on a count for a *quantum meruit*. *Marshal v. Baltimore and Ohio R.R. Co.*, 16 *How. U.S.* 314.

9. Sufficiency of Complaint.—Where a complaint for work, labor, and services, alleged an indebtedness in a sum certain therefor, but omitted to allege specifically the value of the same or a promise to pay; and defendant, without demurring, put in an answer denying indebtedness, admitting services performed, and setting up payment in full, and there was a verdict for plaintiff: whatever the defects of the complaint may be, they were cured by defendant's pleading and by the verdict. *McManus v. Ophir S. M. Company*, 4 *Nev. Rep.* 15.

10. When Action Lies.—The action for work, labor, and services lies upon the contract. If nothing remains to be done by the contractor but payment of the stipulated price, plaintiff may rest upon the duty raised by the law on the part of defendant to pay the price agreed, or he may plead the express agreement, and allege performance; (*Farron v. Sherwood*, 17 *N.Y.* 227;) or excuse for non-performance,

and allege part performance; (*Wolfe v. Howes*, 20 *N.Y.* 197;) if the contract has been abandoned by agreement, or rescinded by the wrongful act of a party, or its execution is incomplete by reason of an excuse. (*Farron v. Sherwood*, 17 *N.Y.* 227; *Wolfe v. Howes*, 20 *Id.* 197.) Where, however, there has been a written contract, it must be produced on the trial, or its absence accounted for. *Clark v. Smith*, 14 *Johns.* 326, and cases there cited; 18 *Johns.* 169; 19 *Id.* 205; 1 *Sandf.* 206; 24 *Wend.* 60; 22 *Barb.* 239; 4 *Duer*, 295.

No. 164.

ii. *For Services at a Reasonable Price.*

[TITLE.]

The plaintiff complains, and alleges :

I. That between the day of, 187., and the day of, 187., at, he [made sundry repairs on several articles of furniture], for the defendant, at his request.

II. That the said services were reasonably worth dollars.

III. That defendant has not paid the same [*or that no part thereof has been paid, except, etc.*]

[*Demand of Judgment.*]

11. Presumption.—A person enjoying the benefit of the services of another, is presumed to be bound to pay therefor what they are reasonably worth. (*Moulin v. Columbet*, 22 *Cal.* 508.) But this presumption may be rebutted by proof of agreement at a fixed amount. (*Id.*) Where a hired person continues in employment after the term of the contract, the presumption is that the same wages are to be continued under the new employment, and the servant cannot recover on a *quantum meruit*. *Nicholson v. Patchin*, 5 *Cal.* 474.

12. Promise Implied.—The general rule of law is, while a special contract remains open or unperformed, the party whose part of it

has not been done cannot sue in *indebitatus assumpsit*, to recover a compensation for what he has done, until the whole shall be completed. But the exceptions from that rule are cases in which something has been done under a special contract, but not in strict accordance with it; but if the other party derives any benefit from the labor done, the law implies a promise on his part to pay such a remuneration as the work is worth; and to recover it an action of *indebitatus assumpsit* is maintainable. (*Dermott v. Jones*, 23 *How. U.S.* 220.) The services must have been rendered in pursuance of an agreement, express or implied, that they were to be paid for. 1 *Selw. N. P.* 45; 2 *Stra.* 793; 12 *Barb.* 473; 5 *Cow.* 531; 3 *N.Y.* 312; *Brunner v. Stout*, *Hard. (Ky.)* 225; *Winston v. Francisco*, 2 *Wash. (Va.)* 187.

13. Quantum Meruit.—The complaint alleging no special contract, plaintiff can recover only what his services are worth. (*Crole v. Thomas*, 19 *Mo.* 70.) In an action on a *quantum meruit*, for services rendered, excuses for not performing the contract need not be set up. (*Wolfe v. Howes*, 20 *N.Y.* 197.) The complaint in an action against a guardian, to recover from his ward's estate for services rendered them, must allege that the employment of the plaintiff was a reasonable and proper expense incurred by the guardian. *Caldwell v. Young*, 21 *Tex.* 800.

14. Services of Wife.—Proof that the plaintiff was wife of one of the parties defendant, defeats the implication of a contract as on a *quantum meruit*. *Angulo v. Suñol*, 14 *Cal.* 402.

15. Subsequent Promise. Where a promise to pay is made subsequent to the completion of the services, it must be shown that the services were rendered at the defendant's request. *Bartholomew v. Jackson*, 20 *Johns.* 28; *Frear v. Hardenbergh*, 5 *Id.* 272; *Force v. Haines*, 2 *Harr. (N.J.)* 385; *Parker v. Crane*, 6 *Wend.* 647; see, also, 7 *Johns.* 87; and 1 *Smith's Lead. Cas.* 67.

*No. 165.*iii. *By Carriers, for Freight.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., he transported [in his wagon], thirty tons of coal, from, to, at the request of the defendant.

II. That defendant promised to pay plaintiff the sum of dollars per ton, as freight thereon [*or* that such transportation was reasonably worth dollars].

III. That defendant has not paid the same.

[*Demand of Judgment.*]*No. 166.*iv. *For Passage Money.*

[TITLE.]

The plaintiff complains, and alleges:

I That on the day of, 187., he conveyed defendant in his steamer called the, from, to, at his request.

II. That defendant promised to pay plaintiff dollars therefor, [*or* that the said passage was reasonably worth dollars].

III. That defendant has not paid the same.

[*Demand of Judgment.*]

*No. 167.**v. By Parent, for Services of Minor Son.*

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B. rendered services [as clerk] to the defendant, at his request, in his store at, from the day of, 187., to the day of, 187..

II. That such services were reasonably worth dollars [*or allege price agreed, as in preceding forms*].

III. That the said A. B. was then and is now under twenty-one years of age, and the minor child of this plaintiff.

IV. That the defendant has not paid the same.

[Demand of Judgment.]

16. Interest of Parent.—Legal interest vests in a parent for the work, labor, and services of his child, where there is no express agreement. (*Shute v. Dorr*, 5 *Wend.* 204.) But under an *express agreement*, or where circumstances warrant the conclusion that it was understood that the child might receive his earnings, payment to such child will be good. (*Id.*; 3 *Cow.* 92; 2 *Mass.* 115; 8 *Cow.* 84.) So, where the father gives his implied assent. (*Whiting v. Earle*, 3 *Pick.* 201; see 7 *Cow.* 92; 3 *Greenl.* 77; 12 *Pick.* 115.) So, the father in the above instances cannot sue for such services, even though he give notice not to pay said son his wages. (*Morse v. Welton*; 6 *Conn.* 547; *U.S. v. Mertz*, 2 *Watts.* 406; *Gale v. Parrott*, 1 *N.H.* 28; *Eubanks v. Peak*, 2 *Bailey*, 497; *Chase v. Smith*, 5 *Vt.* 556.) A father cannot sue in his own name for money due his minor son, in consideration of his enlistment under a contract made with the father's consent. *Mears v. Bickford*, 55 *Me.* 528.

No. 168.

vi. *For Services and Materials, at a Fixed Price.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, he furnished the paint and painted defendant's house, at his request.

II. That defendant promised to pay him dollars therefor.

III. That he has not paid the same [*or* that no part of the same has been paid, except, *etc.*]

[*Demand of Judgment.*]

17. Cause of Action.—In an action for services and materials furnished, where both items go to constitute a single cause of action, it must be made so to appear in the complaint.

18. Demand.—Bringing the action is sufficient demand. *Feeter v. Heath*, 11 *Wend.* 477.

No. 169.

vii. *By an Attorney, for Services and Disbursements.*

[TITLE.]

The plaintiff complains, and alleges:

I. That defendant is indebted to the plaintiff on an account, in the sum of, for services as the attorney of the defendant, rendered upon his retainer, between the day of, 187., and the day of, 187., in prosecuting and defending

certain suits; and for like services, at his request, in drawing and engrossing various instruments in writing, and in counseling and advising the defendant, and for attendance in and about the business of said defendant, at his request; and for money paid out and expended by this plaintiff for the defendant, at his request, in and about said suits and business.

II. That the defendant has not paid the same.

[*Demand of Judgment.*]

19. Contingent Counsel Fees, when Suit Compromised.—

An instruction in a suit on a *quantum meruit*, to recover counsel fees, that "if plaintiffs' fee was to be contingent on success, and defendant settled the suit without plaintiffs' consent, plaintiffs could recover what their services were worth," does not incorrectly state the law. Quint *v.* Ophir S. M. Company, 4 *Nev. Rep.* 304.

20. Counsel Fees—what to be Taken into Account.—

To ascertain what may be a reasonable compensation for services rendered by an attorney, the amount involved and the character of the business transacted by him must be taken into account, and the time employed; not the time immediately devoted to the business alone, but the time which he must lose from other business in attending to it. Quint *v.* Ophir S. M. Co., 4 *Nev. Rep.* 304.

21. Counsel Fees, Traveling Expenses, and Time Lost.—

An instruction to the jury in a suit to recover counsel fees, that, "if plaintiffs were employed by defendant to come from San Francisco to Virginia City, or from San Francisco to Aurora, and there was no special agreement as to the amount to be paid, they can only recover the value of the services rendered at the place where they were rendered, with the addition of reasonable traveling expenses; and if the traveling expenses were paid by defendant, then they cannot be recovered by plaintiffs:" *Held*, clearly erroneous, and properly refused. Quint *v.* Ophir S. M. Company, 4 *Nev. Rep.* 314.

22. Money and Services.—Complaint for money expended, and services performed should state, *for the use and benefit* of defendant

and at his *instance* and *request*. So in regard to performance of labor. *Huguet v. Owen*, 1 *Nev.* 464.

23. Professional Services.—A complaint which avers substantially that the defendant was, at a certain time, indebted to the plaintiff in a certain sum, for professional services rendered at the special instance and request of the defendant, is sufficient, without stating in terms the value of the services, or that the defendant promised to pay. *Wilkins v. Stidger*, 22 *Cal.* 232.

24. Retainer.—In an action by an attorney for his fees, it is necessary to aver and prove on the trial, a retainer or employment of the plaintiff as attorney, in the suit or business in which his services were rendered. (*Hotchkiss v. Leroy*, 9 *Johns.* 142; *Burghart v. Gardner*, 3 *Barb.* 64.) It is not necessary to show a written retainer. A parol employment will suffice; or the jury may infer a retainer from acts of the client, in the progress of the suit, amounting to a recognition of the attorney, or from his undertaking to pay for the services. *Harper v. Williamson*, 1 *McCord*, 156; *Owen v. Ord*, 3 *Carr. & P.* 349; *Wiggins v. Peppin*, 3 *Beav.* 340; see, also, *Allen v. Bane*, 4 *Id.* 494.

25. Services for Third Party.—If the services were rendered as attorney of another person than the defendant, facts showing the defendant's liability therefor must be alleged. *Merritt v. Millard*, 5 *Bosw.* 645.

No. 170.

viii. *For Services and Material, at a Reasonable Price.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, he built a house known as No., Street, in said City, and furnished the materials therefor, for the defendant, at his request.

II. That the said work and materials were reasonably worth dollars.

III. That the defendant has not paid the same.

[Demand of Judgment.]

No. 171.

ix. *By Advertising Agents, for Services and Disbursements.*

[TITLE.]

The plaintiff complains, and alleges:

I. That between the day of, 187., and the day of, 187., at, the plaintiff rendered services to the defendant, at his request, in causing the defendant's advertisements of his business to be inserted in the following named newspapers and periodicals: [*names of newspapers.*]

II. That the plaintiff paid out, at the request of the defendant, for such insertions for the use of the defendant, and at his request, dollars.

III. That the defendant promised to pay said amount, together with a reasonable sum for said services.

IV. That said services were reasonably worth dollars.

V. That he has not paid said amounts, or either of them.

[*Demand of Judgment.*]

No. 172.

x. *By Publisher and Proprietor, for Advertising.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiffs at the times hereafter mentioned were publishers and proprietors of the daily newspaper known as the "Mountain Avalanche," published at, in the County of, in this State.

II. That between the day of, 187., and the day of, 187., the plaintiff published insertions in the said newspaper, of the advertisements of the defendant.

III. That such services and publication were reasonably worth dollars.

IV. That the defendant has not paid the same.

[*Demand of Judgment.*]

No. 173.

xi. *For Stabling Horses.*

[TITLE.]

The plaintiff complains, and alleges :

I. That at the request of the defendant, he provided for, kept, and fed a horse of the defendant.

II. That such keeping and finding of said horse was reasonably worth dollars.

III. That he has not paid the same.

[*Demand of Judgment.*]

No. 174.

xii. *Special Contract, Completely Fulfilled.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, the defendant made his agreement in writing, under his hand and seal, of which the following is a copy: [*Copy of agreement.*]

II. That the plaintiff has duly performed all the conditions thereof on his part.

III. That on the day of, 187., at, the plaintiff demanded of the defendant payment of the sum of dollars, in said contract mentioned.

IV. That he has not paid the same.

[*Demand of Judgment.*]

26. Partnership.—Where partners employed plaintiff, on condition that a certain portion of his wages should be retained till a certain sum had accumulated, when plaintiff should become a partner, and during the accumulation the firm dissolved, the plaintiff may sue on the special contract, or for work and labor. *Adams v. Pugh*, 7 Cal. 150.

27. Performance.—If the plaintiff undertakes to aver performance by setting out the facts showing performance, he may be held to aver them with certainty. (*Hatch v. Peet*, 23 Barb. 575.) As to averment of performance on a modified contract, see *Smith v. Brown*, 17 Barb. 431.

No. 175.

xiii. *The Same, where the Contract was Fulfilled by an Assignee.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, defendants, in consideration of, executed and delivered in writing under their hands and seals, a contract with one A. B., of which the following is a copy, and marked "Exhibit A."

II. That thereafter and before the day of

....., said A. B. duly assigned the same, and all his rights under it, to the plaintiff.

III. That up to the time of the assignment, the assignor had duly performed all the conditions of the contract on his part, and that since said assignment, the plaintiff duly performed all the conditions thereof on his part.

IV. That on the day of, 187., at, the plaintiff demanded of the defendant payment of the sum of dollars, in said contract mentioned.

V. That he has not paid the same.

[*Demand of Judgment.*]

[*Annex Copy of Contract, marked "Exhibit A."*]

28. Performance, how Alleged.—One suing on a contract assigned to him may allege performance by saying that up to the time of the assignment the assignor had performed, on his part, all the covenants of the contract, and that afterwards the plaintiff fully performed the conditions imposed by the contract on the assignor. (*California Steam Navigation Co. v. Wright*, 6 *Cal.* 258.) Where plaintiff has bound himself to procure certain acts to be done by third parties, adding that those on whose behalf he acted have also performed, is unnecessary. *Rowland v. Phalen*, 1 *Bosw.* 43.

CHAPTER XIII.

FOR USE AND OCCUPATION.

No. 176.

i. *On an Express Contract.*

[TITLE]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff rented to the defendant, and the defendant hired from the plaintiff [the office No., Street], at the rent of dollars, payable [monthly], on the first day of each [month].

II. That defendant occupied the said premises from the day of, 187., to the day of 187..

III. That defendant has not paid dollars, being the [part of said] rent due on the day of, 187..

[*Demand of Judgment.*]

1. Occupancy.—Actual continued occupancy is not necessary to be shown. *Little v. Martin*, 3 *Wend.* 220; *Westlake v. De Graw*, 25 *Id.* 669; *Hoffman v. Delihanty*, 13 *Abb. Pr.* 388.

*No. 177.*ii. *For Rent Reserved in a Lease.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, the defendant, entered into a covenant with plaintiff, under their hands and seals, a copy of which is annexed hereto, and made a part of this complaint, marked "Exhibit A" [*or state the substance of the agreement*].

II. That the defendant has not paid the rent for the month ending on the day of, 187., amounting to dollars.

[*Demand of Judgment.*][*Annex Copy of Lease, marked "Exhibit A."*]

2. Designation of Premises.—The premises may be designated by a simple reference to the lease, as in the above form. *Dundas v. Lord Waymouth*, *Cowp.* 665; *Van Rensselaer v. Bradley*, 3 *Den.* 135.

3. Forfeiture.—The tenant cannot insist that his own act amounted to a forfeiture; if he could the consequence would be, that in every instance of an action of covenant for rent, brought on a lease, containing a provision that it should be void on the non-performance of the covenants, the landlord would be defeated by a tenant showing his own default at a prior period, which made the lease void. (*Doe dem. Bryan v. Banks*, 4 *Barn. & Ald.* 409; *Stuyvesant v. Davis*, 9 *Paige*, 427; *Canfield v. Westcott*, 5 *Cowes.* 270; *Williams v. Tallott*, 15 *Tæx.* 1.) At common law, there was no forfeiture of an estate for years, for the non-payment of rent. (*Chipman v. Emeric*, 3 *Cal.* 273.) By failure to pay rent when demanded, the contract under the lease is determined, and possession from that time is tortious. (*Treat v. Liddell*, 10 *Cal.* 302.) But the mere failure to pay will not make a forfeiture a formal demand

on the day it became due, and a demand is necessary. (*Gaskill v. Trainer*, 3 *Cal.* 334.) Where the record shows no demand of rent, there can be no forfeiture. *Chipman v. Emeric*, 3 *Cal.* 273.

4. Liability of Tenant.—The tenant is liable to payment until he has restored full and complete possession to the landlord, and his liability to pay the rent is not discharged by an eviction, unless under a title superior to the landlord's, or by some agency of the landlord's. *Schilling v. Holmes*, 23 *Cal.* 227.

5. Term of Lease.—If the tenant takes a receipt from his landlord, specifying the amount of rent paid, and the length of the term, to commence on the expiration of the lease, the new term will be for the time specified in the receipt. No new tenancy by implication arises in such cases. (*Blumenberg v. Myres*, 32 *Cal.* 93.) H. served upon his tenant B., who was occupying under him certain premises, under a rent of two hundred and fifty dollars per month, a notice to quit. Before the time at which, by the effect of the notice, the tenancy would have terminated, B., through a third person, proposed to H. to continue his occupancy, at a rent of three hundred dollars, with which proposal H. expressed himself satisfied, but did not in terms notify B. of his acceptance of it. B. continued to occupy the premises. *Held*, in an action by H. for rent at the rate of three hundred dollars per month, that it must be inferred that the subsequent occupation of B. was with the consent of H., on the basis of the proposal, rather than as a trespasser, and that plaintiff was entitled to recover. *Huff v. Baum*, 21 *Cal.* 120.

No. 178.

iii. For Deficiency after a Re-Entry.

[TITLE.]

The plaintiff complains, and alleges:

I. That by a lease made between the plaintiff and the defendant, on the day of, 187., at, the defendant rented from the plaintiff, and the plaintiff demised, and leased to the defendant the premises therein mentioned, at the monthly rent of

..... dollars, gold coin, payable monthly in advance, on the day of each and every month, and that said indenture contained a covenant of which the following is a copy: [*Copy covenant.*]

II. That the defendant, contrary to his covenant [*state the breach*], and that the plaintiff for that cause re-entered the premises, and took possession thereof by virtue of the authority given in said lease, and as agent of the defendant, and not otherwise, and that he made diligent efforts to relet the premises for the defendant, but was unable to do so.

III. That thereby the plaintiff lost the sum of dollars, for rent for the months of and

[*Demand of Judgment.*]

6. Surrender of Premises.—One of the most important duties of the tenant is to peaceably surrender the premises as soon as the tenancy has expired. (*Schilling v. Holmes*, 23 Cal. 227.) The surrender of a leasehold estate is the merger of the fee, but this will not defeat the rights of a third party intervening before the merger took effect. *Gaskill v. Trainer*, 3 Cal. 334.

7. Waiver of Forfeiture.—The subsequent receipt of the rent by the lessor is a waiver of the forfeiture, unless the covenant was a continuing covenant, or the lessor was ignorant of the breach. (*McGlynn v. Moore*, 25 Cal. 384.) The forfeiture of a lease is not waived by the lessor allowing the tenant to hold over without notice to quit, unless circumstances show a new term created. *Calderwood v. Brooks*, 28 Cal. 151.

*No. 179.**iv. Against Assignee of Lessee.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., by a lease made between this plaintiff and one A. B., under the hand and seal of said A. B. [of which a copy is annexed], this plaintiff leased to said A. B., and said A. B. rented from the plaintiff certain lands, to have and to hold, to said A. B. and his assigns, from the day of, 187., for the term of then next ensuing, for the [monthly] rent of dollars, payable to this plaintiff on the [*state days of payment*], which rent said A. B. did thereby, for himself and his assigns, covenant to pay to the plaintiff accordingly.

II. That thereafter, and during said term, to wit, on the day of, 187. [*naming a day before the breach*], all the estate and interest of said A. B. in said term, by an assignment then by him made, became vested in the defendant, who thereupon entered into possession of the demised premises.

III. That during the time the defendant was so possessed of the premises, to wit, on the day of, 187., the sum of dollars of said rent, for the month ending on that day [*or otherwise*], became due to the plaintiff from the defendant.

IV. That he has not paid the same.

[*Demand of Judgment.*]

8. Assignment.—In such cases the assignment need not be more specifically alleged. *Van Rensselaer v. Bradley*, 3 *Den.* 135; *Norton v. Vultee*, 1 *Hall*, 384.

9. Liability.—The liability of an assignee is confined to the term during which he holds the premises, by himself, or his immediate tenants. (*Astor v. Lamoreaux*, 4 *Sandf.* 524.) As to liability of one in possession without a valid assignment, see (*Carter v. Hammett*, 12 *Barb.* 253; *Ryerss v. Farwell*, 9 *Id.* 615.) The assignee of a lease may discharge himself from all liability under the covenants of the lease, by assigning over; and the assignment over may be to a prisoner, a *femme covert*, or a person on the eve of quitting the country forever, provided the assignment be executed before his departure, and even though a premium is given as an inducement to accept the transfer. *Johnson v. Sherman*, 15 *Cal.* 287; citing 2 *Platt on Leases*, 416.

10. Non-Payment.—It is sufficient to aver that the defendant has not paid the same. *Dubois v. Van Orden*, 6 *Johns.* 105; *Van Rensselaer v. Bradley*, 3 *Den.* 135; *Holsman v. De Gray*, 6 *Abb. Pr.* 79.

No. 180.

v. *Grantee of Reversion, against Lessee.*

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B., was the owner in fee of certain premises, [*describe them*], and on the day of, 187., by a lease made between him and the defendant, under the hand and seal of the defendant, a copy of which is annexed and made a part of this complaint, marked "Exhibit A," he leased to the defendant said premises from the day of, 187., for the term of then next ensuing, for the [monthly or yearly] rent of dollars, payable to said A. B., his heirs and assigns, on the [*state days of payment*], which rent the defendant did thereby covenant to pay to said A. B., his heirs and assigns, accordingly.

II. That thereafter, on the day of

187., at, said A. B., by his deed, under his hand and seal, sold and conveyed to this plaintiff the demised premises.

III. That notice thereof was given to this defendant.

IV. That thereafter, to wit, on the day of, 187., the sum of dollars of said rent, for the quarter ending on that day [*or otherwise*], became due to the plaintiff from the defendant.

V. That the defendant has not paid the same.

[*Demand of Judgment.*]

11. Allegation of Assignment.—That on the day of, 187., at, the said A. B. assigned to the plaintiff said lease and covenants, and all his right to the rent therein secured.

12. Allegation by Heir of Reversioner.—That the said A. B. was on the day of, 187., seized of the reversion in said demised premises. That afterwards, and during the said term, on the day of, 187., A. B. died so seized; whereupon the said reversion then descended to the plaintiff as his son and heir; and thereby plaintiff then became seized thereof in fee.

13. Assignments.—In these actions, the complaint should specifically allege the assignments to the grantee, and the better plan is to annex a copy or copies (if there be several) to the complaint. (*Beardsley v. Knight*, 4 *W.* 471.) It should be alleged distinctly that there was a lease, that the defendant was lessee, and is sued for the rent. *Willard v. Tillman*, 2 *Hill*, 274.

No. 181.

vi. *Assignee of Devisee, against Assignee of Lessee.*

[TITLE.]

The plaintiff complains, and alleges :

I. That one A. B. was in his lifetime the owner in fee of certain premises [*describe them*], and that on the day of, 187., he leased the same to one C. D., by his lease dated on that day, a copy of which is hereto annexed, as part of this complaint, and marked "Exhibit A."

II. That by virtue thereof, the said C. D. entered into the possession of the demised premises.

III. That on the day of, 187., at, the said C. D. assigned all his right, title, and interest in the demised premlses to the defendant.

IV. That on the day of, 187., at, the said A. B. died.

V. That by his last will and testament, which was proved and admitted to probate, before the Probate Court of the County of, in this State, on the day of, 187., the said A. B. devised the reversion and rent to one E. F.

VI. That on the day of, 187., at, the said E. F. assigned the said reversion and rent to the plaintiff.

VII. That thereafter, to wit, on the day of, 187., the sum of dollars, for the [month *or* quarter] ending on that day, was not paid by the defendant.

[*Demand of Judgment.*]

[*Annex Copy of Lease, marked "Exhibit A."*]

14. Executor and Devisee.—One who is both executor and devisee of the lessor may join a claim for rent subsequent to the decease of testator, with a claim for damages for breach of covenant respecting personal property embraced in the lease. *Armstrong v. Hall*, 17 *How. Pr.* 76.

15. Form.—It is not expected that this form will be of special use to the profession in California, but instances may present themselves where it may be of utility, and it is therefore inserted.

No. 182.

vii. *For Use and Occupation of Pasture.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant hired from the plaintiff, and the plaintiff rented to the defendant, the vacant lot of land [*describe it*], at the rent of dollars, payable in gold coin, monthly [*or otherwise*], on the first day of each month.

II. That defendant occupied said lot by permission of the plaintiff, and as his tenant, for the grazing of his sheep [*or cattle*], from the day of, 187., to the day of, 187..

III. That the defendant has not paid the rent for the months of and

[*Demand of Judgment.*]

16. Request and Permission.—The allegation that the use and occupation of the lot in question was at the request of defendant, and by the permission of plaintiff, was the allegation of a contract, which the plaintiff is bound to establish to enable him to succeed. *Sampson v. Shaeffer*, 3 *Cal.* 201.

17. Terms Stated.—If a plaintiff in an action on a contract for the pasturage of cattle at a fixed price, does not insert in his complaint any *quantum valebat* count, judgment must be for the stipulated sum, or for the defendant. *Seale v. Emerson*, 25 *Cal.* 293.

No. 183.

viii. *For Use and Occupation—Implied Contract.*

[TITLE.]

The plaintiff complains, and alleges:

I. That defendant occupied the [stable, *or* dwelling house, No. 47 Street], by permission of the plaintiff, from the day of, 187., until the day of, 187..

II. That the use of the said premises for the said period was reasonably worth dollars.

III. That defendant has not paid the same.

[*Demand of Judgment.*]

18. Foundation of the Action.—No action for use and occupation will lie where possession is adverse and tortious, for there can be no implication of a contract. (*Sampson v. Schaeffer*, 3 *Cal.* 196; *Ramirez v. Murray*, 5 *Cal.* 222.) The right to recover for use and occupation is founded alone upon contract. (*O'Connor v. Corbitt*, 3 *Cal.* 370.) Or an agreement by which the tenant, with permission of the owner, occupied the premises. (*Keating v. Bulkley*, 2 *Stark.* 419; 3 *Eng. Com. L. R.* 411; 52 *Eng. Com. L. R.* 653; *Selbey v. Browne*, 7 *Q.B.* 620; 53 *Eng. Com. L. R.* 620.) But in certain cases a contract may be implied. *Osgood v. Dewey*, 13 *Johns.* 240; *Abeel v. Radcliff*, *Id.* 297; *Porter v. Bleiler*, 17 *Barb.* 149; *Ryerss v. Farwell*, 9 *Id.* 615; see 2 *Eng. Com. L. R.* 467.

19. Implied Demise.—The plaintiff need not set forth an implied demise, but may declare for use and occupation, and recover on the special facts shown. (*Morris v. Niles*, 12 *Abb. Pr.* 103; *Waters v.*

Clark, 22 *How. Pr.* 104.) No tenancy can be implied under a party who has not the legal estate. (*Morgell v. Paul*, 2 *Mann. & R.* 303; 102 *Eng. Com. L. R.* 80.) But it would appear that one occupying and paying rent to an apparent proprietor as his landlord, cannot, when sued, allege that he has only the equitable estate. *Dolby v. Hes*, 11 *Ad. & E.* 335; S.C., 39 *Eng. Com. L. R.* 195.

20. Improvements.—A defendant who entered under a bond for a deed from the plaintiff, cannot set off his improvements against the damages for use and occupation. *Kilburn v. Ritchie*, 2 *Cal.* 145.

21. Indebtedness.—An averment of use and occupation as tenant is a sufficient averment of indebtedness. *Walker v. Manro*, 18 *Mo.* 564.

22. Interest.—Interest may be recovered on a claim for use and occupation, after demand. *Ten Eyck v. Houghtaling*, 12 *How. Pr.* 523.

23. Parties.—The grantee of demised premises, on the reversion thereof, is the proper party to bring suit for the recovery of rent which accrued and became due before, and, *a fortiori*, after the conveyance to him. After such conveyance, an action by the grantor for rent cannot be sustained. (*Anderson v. Treadwell*, 1 *Edm.* 201.) *Tenants in common* may join in an action for use and occupation without showing a joint demise. (*Porter v. Bleiler*, 17 *Barb.* 149.) So, in England, an *infant* can also maintain this action although he has a general guardian. *Id.*; and see *Fitzmaurice v. Waugh*, 3 *Dowl. & R.* 273; 16 *Eng. Com. L. R.* 169.

24. Permission Shown.—The plaintiff must show that the defendant used and occupied the premises by the permission of the plaintiff. *Sampson v. Schaeffer*, 3 *Cal.* 196.

25. Possession, when Adverse.—If the occupation was contrary to the owner's will, his action must be for damages. (*Smith v. Stewart*, 6 *Johns.* 46; *Bancroft v. Wardwell*, 13 *Id.* 489; *Hall v. Southmayd*, 15 *Barb.* 32.) If the complaint shows that the occupation was a trespass, it is of course bad on demurrer. (*Hurd v. Miller*, 2 *Hill.* 540.) Authorities upon this point are hardly necessary.

26. Separate Demands.—In New York, in an action for use and occupation, demands for rent which accrued in the lifetime of a decedent, and for rent accruing after his decease, while the tenancy was continued by the executors on account of the estate, are properly

joined as one cause of action, against the executors as such. *Pugsley v. Aiken*, 11 *N.Y.* 494.

27. Tenant at Will.—If a party enters upon land which he has contracted to purchase, with the consent of the vendor, and the contract falls through because the purchaser fails to pay as agreed, the vendor may treat him as a tenant at will, and may bring *assumpsit* for use and occupation, or it seems he may maintain trespass. (*Woodbury v. Woodbury*, 47 *N.H.* 11.) After the determination of a tenancy at will by notice, *assumpsit* for use and occupation lies against the tenant, if he holds over. *Hogsett v. Ellis*, 17 *Mich.* 351; 3 *Am. Law Rev.* 757, 758.

28. Title.—It seems that in this action plaintiff need not aver title, and the defendant cannot object to his title. *Vernam v. Smith*, 15 *N.Y.* 329.

No. 184.

ix. For Lodging and Board.

[TITLE.]

The plaintiff complains, and alleges:

I. That from the day of, 187., until the day of, 187., defendant occupied certain rooms in the house [No. 54 Street, City of, by permission of the plaintiff, and was furnished by the plaintiff, at his request, with food, attendance, and other necessities.

II. That in consideration thereof, the defendant promised to pay [*or the same was reasonably worth*] the sum of dollars.

III. That defendant has not paid the same.

[*Demand of Judgment.*]

29. Allegation for Lodging.—That the defendant occupied rooms in, and part of the house of the plaintiff, at [*and if furnished, add, together with furniture, linen, and other household*

necessaries, of the plaintiff, which were therein], by the plaintiff's permission, as his tenant, from, etc.

No. 185.

x. *For the Hire of Personal Property.*

[TITLE.]

The plaintiff complains, and alleges:

I. That between the day of, 187., and the day of, 187., the defendant hired from the plaintiff [horses, carriages, *etc.*], for which he owes the plaintiff on an account thereof, the sum of dollars, which was payable on the day of, 187..

II. That the defendant has not paid the same [*or* that no part of the same has been paid, except the sum of, *etc.*]

[*Demand of Judgment.*]

30. Facts.—Facts on which the amount of compensation depends must be set forth. *Relyea v. Drew*, 1 *Den.* 561.

31. Hired, implies a request. *Emery v. Fell*, 2 *T. R.* 28.

No. 186.

xi. *Hire of a Piano Forte, with damages for not Returning it.*

[TITLE.]

The plaintiff complains, and alleges:

First.—For a first cause of action:

I. That on the day of, 187., at, the defendant hired from the plaintiff one

pianoforte, the property of the plaintiff, for the space of [six] months then next ensuing, to be returned to this plaintiff at the expiration of said time in good condition, reasonable wear excepted, for the use of which he promised to pay this plaintiff a reasonable sum [*or state how much*].

II. That dollars was a reasonable sum for the hire of the same.

III. That he has not paid the same.

Second.—And for a second cause of action:

I. That the value of the pianoforte so hired by the defendant, as above alleged, was dollars, and that the defendant, in violation of his agreement, has not returned the same, although he was, on the . . . day of, 187., at, requested by the plaintiff so to do; to the damage of the plaintiff dollars.

[*Demand of Judgment.*]

No. 187.

xii. *Hire of Furniture, etc., with Damages for Ill-Use.*

[TITLE.]

The plaintiff complains, and alleges:

First.—For a first cause of action:

I. That on the day of, 187., at, the plaintiff rented to the defendant, and the defendant hired from the plaintiff, household furniture, plate, pictures, and books, the property of the plaintiff, to wit: [*describe the articles*]—for the space of then next ensuing, to be returned by him to the plaintiff

at the expiration of said time, in good condition, reasonable wear and tear thereof excepted.

II. That he promised to pay the plaintiff for the use thereof dollars [in equal quarterly payments, on the days of thereafter].

III. That no part thereof has been paid.

Second.—For a second cause of action:

I. The plaintiff further alleges, that the value of the property so hired by the defendant, as above alleged, was dollars.

II. That the defendant, in violation of his said agreement to return the same in good condition, neglected the same, and through his negligence, carelessness, and ill-use, the same became broken, defaced, and injured beyond the reasonable wear thereof, and in that condition were returned to the plaintiff, to his damage dollars.

[*Demand of Judgment.*]

CHAPTER XIV.

SEVERAL CAUSES OF ACTION UNITED.

No. 188.

i. Cause of Action under the Money Counts.

[TITLE.]

The plaintiffs complain, and allege:

I. That at the times hereafter mentioned, the plaintiffs were partners, doing business at the City and County of San Francisco, State of California, under the firm name of A. B. & Co., and the defendants were partners doing business at the said City and County of San Francisco, under the firm name of C. D. & Co.

First.—For a first cause of action, the plaintiffs allege:

I. That on the day of, 187., at, at the request of the defendants, the plaintiffs deposited with the defendants the sum of dollars, gold coin of the United States, which sum the defendants promised to pay to the plaintiffs on demand.

II. That on the day of, 187., at, the plaintiffs demanded payment of the same from the defendants, but they have not paid the same.

Second.—And for a second cause of action, the plaintiffs allege:

I. That on the day of, 187., at, the defendants received dollars from one E. F., to be paid to the plaintiffs.

II. That the defendants have not paid the same.

Third.—And for a third cause of action, the plaintiffs allege:

I. That on the day of, 187., at, the plaintiffs lent to the defendants dollars.

II. That the defendants have not paid the same.

[*Demand of Judgment.*]

1. Accounts.—As to when separate accounts between the same parties are separate causes of action, and may be separately stated, see *Phillips v. Berick*, 16 *Johns.* 136; *Stevens v. Lockwood*, 13 *Wend.* 644; *Staples v. Goodrich*, 21 *Barb.* 317; *Secor v. Sturgis*, 2 *Abb. Pr.* 69; *Longworth v. Knapp*, 4 *Id.* 115.

2. Accounting and Refunding.—The plaintiff may demand in the same action, that defendant account for, and refund a proportion of the outfit and advances made on a joint adventure. *Garr v. Redman*, 6 *Cal.* 574.

3. Causes of Action may be United.—The plaintiff may unite several causes of action in the same complaint, when they arise from and constitute part of the same transaction; (*Cal. Pr. Act*, § 64; see "*Complaints*," p. 208, n. 25;) if such unison does not amount to a misjoinder, in which case the objection can be raised only by demurrer. (*Fritz v. Fritz*, 23 *Ind.* 388.) But actions so united must affect all the parties to the action, and not require different places of trial; (*Cal. Pr. Act*, § 64; see "*Complaints*," pp. 208–210; *Ladd v. James*, 10 *Ohio St. Rep.* 437; *Hammond v. Deaver*, 2 *W. Law Month.* 591; *Lexington R.R. Co. v. Goodman*, 15 *How. Pr.* 85; *Tompkins v. White*, 8 *How Pr.* 520;)

and must belong to the same class; (*Enos v. Thomas*, 4 *How. Pr.* 48; *Furniss v. Brown*, 8 *Id.* 59; *Hulce v. Thompson*, 9 *How. Pr.* 113; *Burdick v. McAmbly*, *Id.* 117;) and must be consistent with each other. *Smith v. Hallock*, 8 *How. Pr.* 73; see "*Complaints*," p. 209, Note 27.

4. Claims in two Capacities.—Claims against trustees, by virtue of a contract, or by operation of law, may be joined. (*Cal. Pr. Act*, § 64.) So, a trust and a vendor's lien may be united in one action. *Burt v. Wilson*, 28 *Cal.* 632.

5. Counts on Promises to the testator and to his executor in his representative capacity, may be joined. (*Brown v. Webber*, 6 *Cush.* 571.) Counts on promises made by the testator may be joined with counts on promises made by the administrator, as such. (*Hapgood v. Houghton*, 10 *Pick.* 154; *Dixon v. Ramsay*, 1 *Cranch C. Ct.* 472.) After counts by the plaintiff, as executor, for an excessive distress, and for distraining for more rent than was due, the declaration proceeded thus: "And the plaintiff, as such executor as aforesaid, also sues the defendant for money paid by the plaintiff as such executor as aforesaid, for the defendant, at his request, and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on an account stated between them. And the plaintiff, as such executor as aforesaid, claims, etc. *Held*, on demurrer, that the declaration was bad for misjoinder. *Davies v. Davies*, 1 *Hurl. & Colt.* 451; see "*Complaints*" p. 209.

6. Class.—Where the form of the action is the same, and where the same plea may be pleaded and the same judgment given on all the counts, they are well joined. *Fairfield v. Burt*, 11 *Pick.* 244; *Worster v. Canal Bridge*, 16 *Pick.* 541; *Prescott v. Tufts*, 4 *Mass.* 146.

7. Common Counts.—So, the common counts may be united in one complaint, if separately stated. (*Freeborn v. Glazier*, 10 *Cal.* 337; *De Witt v. Porter*, 13 *Id.* 171; *Buckingham v. Waters*, 14 *Id.* 146; *Keller v. Hicks*, 22 *Cal.* 457; *Birdseye v. Smith*, 32 *Barb.* 217.) But they cannot be united in one count as one cause of action, without any specification of the sums due upon each several cause. *Buckingham v. Waters*, 14 *Cal.* 146; see "*Complaints*," p. 209.

8. Contracts.—Contracts, express or implied, may be united. (*Cal. Pr. Act*, § 64.) For sums due in damages for delay, and a demand to set aside an award, all growing out of the same contract, may

be united in one action. (*Lee v. Partridge*, 2 *Duer*, 463.) To reform a written contract, and for judgment thereon, when reformed. (*Story's Eq. Jur.* § 157-161; 2 *Johns. Ch.* 585; 4 *Id.* 144; *Gooding v. McAlister*, 9 *How. Pr.* 123.) For reformation of a contract, and for damages for breach of it. (*Bidwell v. Astor Mut. Ins. Co.*, 16 *N.Y.* 263.) Damages for false representations, and for breach of contract. (*Robinson v. Flint*, 16 *How. Pr.* 240; 7 *Abb. Pr.* 393; see, however, *Waller v. Raskan*, 12 *How. Pr.* 28.) Loss of goods by carrier, and also for freight overpaid. (*Adams v. Bissell*, 28 *Barb.* 382.) As to contracts, with allegations of matters of fraud, (*Roth v. Palmer*, 27 *Barb.* 652.) A cause of action for false representations in inducing the plaintiff to enter into a contract, and a cause of action for a breach of the same contract, may be joined. (*Robinson v. Flint*, 7 *Abb. Pr.* 393.) On the joinder of ordinary claims in contract with claims for which defendant is arrestable, the plaintiff may waive arrestability in the latter case. *Hickox v. Fay*, 36 *Barb.* 9.

9. Contract of Partners.—A complaint, after stating cause of action on a contract against partners, and demanding judgment therefor, contained also allegations that the defendants were insolvent, and had fraudulently confessed judgment to hinder their creditors, and demanded an injunction and a receiver. *Held*, that although the last matter might be obnoxious to a motion to strike out, its insertion did not render the complaint demurrable. (*Meyer v. Van Collem*, 7 *Abb. Pr.* 222.) In Massachusetts, a surviving partner may join in the same action a demand due to the firm, and another due to himself in his own right; or demands due to him as the surviving partner of two firms. *Stafford v. Gold*, 9 *Pick.* 533.

10. Each Cause Complete.—Each separate cause of action, as stated, must be complete in itself, and must stand by itself. (*Lattin v. McCarty*, 17 *How. Pr.* 239; 8 *Abb. Pr.* 225; see, also, 14 *Cal.* 146; 8 *How. Pr.* 177; 9 *Id.* 78; *Id.* 123, 198, 342, 378, 436; 10 *How. Pr.* 361; 11 *How. Pr.* 24, 408; 12 *How. Pr.* 28; 2 *Abb. Pr.* 402; 4 *Abb. Pr.* 176, 202; *Harsen v. Bayaud*, 5 *Duer*, 656; *Badger v. Benedict*, 1 *Hill.* 414; *Dorman v. Kellam*, 14 *How. Pr.* 184; *collaterally*, *White v. Low*, 7 *Barb.* 204.) And *directly*, that numerous items of a distinct class should be stated in distinct counts, *Adams v. Holley*, 12 *How. Pr.* 326; *Hillman v. Hillman*, 14 *Id.* 456; and see, also, *Longworthy v. Knapp*, 4 *Abb. Pr.* 115; and *Rowland v. Phalen*, 1 *Bosw.* 43; see "*Complaints*," p. 210, Note 31.

11. Injuries to the Person.—Claims for injuries to character, or injuries to character and malicious arrest and prosecution, may be united. (*Cal. Pr. Act*, § 64; 6 *How. Pr.* 229; 10 *Barb.* 656; 1 *C. R. (N.S.)* 287; *Martin v. Matteson*, 8 *Abb. Pr.* 3; *Watson v. Hazard*, 3 *C. R.* 218; *Hull v. Vreeland*, 42 *Barb.* 543; 18 *Abb. Pr.* 182.) Plaintiff may recover in an action for the combined injury to character and person, when the matters arise from and constitute a part of the same transaction. (*Jones v. Steamship "Cortes,"* 17 *Cal.* 487.) Criminal conversation with plaintiff's wife, *held* to be an injury to the person. (*De La Mater v. Russell*, 2 *Code R.* 147.) So, also, is seduction. *Taylor v. North*, 3 *Code R.* 9; see "*Complaints*," p. 214.

12. Injuries to Person and Property.—It seems that negligence and the damage arising therefrom, both to the person and property of plaintiff, may be united. (10 *Bing.* 112, 117; 14 *Johns.* 433; 10 *Wend.* 328; 1 *Chitt. Pl.* 127; *Howe v. Peckham*, 6 *How. Pr.* 229.) For one injury, all the acts of negligence should be alleged in one count. (5 *How. Pr.* 439; 9 *Id.* 83, 85; 10 *Id.* 155; 11 *Id.* 281; *Dickens v. N.Y. Cent. R.R. Co.*, 13 *How. Pr.* 228.) Injuries resulting to both person and property, from the same negligent act, constitute but one cause of action. (*Howe v. Peckham*, 10 *Barb.* 656; 6 *How. Pr.* 229; *Grogan v. Lindeman*, 1 *Code R. (N.S.)* 287.) If several acts of negligence result in one injury, they may all be stated in one count. *Dickens v. N.Y. Cent. R.R. Co.*, 13 *How. Pr.* 228.

13. Injuries to Property.—Actions for injuries to property may be united. (*Cal. Pr. Act*, § 64; *Moore v. Massini*, 32 *Cal.* 590; *Howe v. Peckham*, 6 *How. Pr.* 229; 10 *Barb.* 656; 1 *C. R. (N.S.)* 381; *Grogan v. Lindeman*, 1 *C. R. (N.S.)* 287.) The union in one count of a complaint, of an allegation that defendants "have wrongfully built dams and flumes across said Mormon Creek * * so as to turn the water of said creek out of its natural channel," etc., and thus divert it from plaintiff, with an allegation that defendants "have constructed gates, etc., in their said dams and flumes, which they * * hoist for the purpose of clearing out said dams and flumes of slum, stone and gravel, the accumulation of which renders the water useless to plaintiff," does not make the complaint demurrable, on the ground that it unites several distinct causes of action in one count. (*Gale v. Tuolumne Water Co.*, 14 *Cal.* 25.) In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam, and the consequent washing away of the pay-dirt

of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. (*Fraser v. Sears Union Water Co.*, 12 *Cal.* 555.) Detention of property, and injury to it while detained, may be united. (*Smith v. Orser*, 43 *Barb.* 187.) Value of property destroyed, and damages, may be united. (*Tendeson v. Marshall*, 3 *Cal.* 440.) Allegations for conversion, and prayer for specific delivery, is no misjoinder. (*Vogel v. Badcock*, 1 *Abb. Pr.* 176.) For violation of agreement, and for injury to personal property. (*Badger v. Benedict*, 1 *Hill.* 414; 4 *Abb. Pr.* 176.) Damages and injunction may be joined in an action for threatened injury to property. The owner of land may join in the same complaint a claim for damages, as assignee, caused by a trespass on the land, while it was owned by his grantor, and a claim for an injunction for a threatened injury to the land. (*Moore v. Massini*, 32 *Cal.* 590.) The plaintiff may join in the same complaint a cause of action for distinct and independent injuries to property, and the property injured in each cause of action may be the same or different, and may be either personal or real. *Id.*

14. Jurisdiction.—Where the separate causes of action amount together to more than the sum required to give jurisdiction, if joined in one declaration they will give jurisdiction. *Ridgeway v. Pancoast*, 1 *Cranch C. Ct.* 88.

15. Money Counts and Warranty.—Money counts may be added to a count on the warranty. (2 *East.* 451.) Or a count for deceit may be added to a count on the warranty. (10 *Vt.* 457; 2 *Mann. & G.* 279; *Schuhardt v. Allens*, 1 *Wall. U.S.* 359; affirming *S.C.*, 1 *Am. Law Reg.* 13; *Dobbin v. Foyles*, 2 *Cranch C. Ct.* 65; *Rotchford v. Meade*, 3 *Id.* 650.) But a claim in *assumpsit* for warranty of a horse, and for wrongfully concealing his defects, could not be united. (*Sweet v. Ingerson*, 12 *How. Pr.* 331; *Springstead v. Lawson*, 23 *How. Pr.* 302.) But when the form of action in tort is adopted, it is not necessary, to enable plaintiff to recover upon the count for false warranty, that a *scienter* should be averred. 2 *East.* 446; 2 *Carr. & P.* 240; 2 *Mann. & G.* 279; 12 *Barb.* 336; 4 *Blatchf.* 293; 8 *Gratt.* 449; 11 *Ired. Law.* 443; see further, "*Complaints*," p. 212.

16. Money Had.—A claim for money had and received, and a claim to deliver up satisfied promissory note, arising out of the same transaction, may be united. *Cahoon v. Bank of Utica*, 7 *How. Pr.* 401.

17. Quantum Meruit.—A *quantum meruit* or a *quantum val-*

ebant, may be joined with counts upon a speciality. *Smith v. Lowell*, 8 *Pick.* 178; *Van Dunsen v. Blum*, 18 *Id.* 229.

18. Separate Demands.—Separate demands under one and the same right, may likewise properly be joined in the same action. (*Longworthy v. Knapp*, 4 *Abb. Pr.* 115.) Several grounds of liability against the same defendant, arising out of the same transaction, may be joined in one action. (*Durant v. Gardner*, 19 *How. Pr.* 94; 10 *Abb. Pr.* 445.) By the same plaintiff, as devisee for rent, and as executrix, for breach of covenant, all arising out of the same lease. (*Armstrong v. Hall*, 17 *How. Pr.* 76.) So, also, claims against the same defendant in different capacities may be united. (*Pugsley v. Aiken*, 1 *Kern.* 494; *Lord v. Vreeland*, 13 *Abb. Pr.* 195.) For money received on account of an estate, and also for a promissory note which is a part of the estate, but payable to executor individually. (*Wells v. Webster*, 9 *How. Pr.* 251.) So of claims against various parties, liable to contribute their proportion for repairs, for the general benefit of all. (*Denman v. Prince*, 40 *Barb.* 213.) Against constable for different breaches of duty, and against his surety, held capable of joinder, (*Moore v. Smith*, 10 *How. Pr.* 361.) It would also seem that in New York, a claim by a stockholder, who is also a judgment-creditor of a corporation, may in certain cases maintain an action against the corporation, and against its other stockholders, and its other creditors, with a view to ascertain and provide for the rights of all parties. *Geery v. N.Y. and Liverpool S. S. Co.*, 12 *Abb. Pr.* 268; see, also, "*Complaints*," p. 213.

19. Separate Statement.—Such causes of action so united, must be separately stated, in a manner equivalent to that adopted in framing separate counts under the old practice. *Cal. Pr. Act*, § 64; *Boles v. Cohen*, 15 *Cal.* 150; *Hoffman v. Tuol. Wat. Co.*, 10 *Id.* 413; *Durkee v. Saratoga and Wash. R.R. Co.*, 4 *How. Pr.* 226; *Pike v. Van Wormer*, 5 *How. Pr.* 171; *Lippincott v. Goodwin*, 8 *Id.* 242; *Blanchard v. Strait*, 8 *How. Pr.* 83; *Childs v. Bank of Missouri*, 17 *Mo.* 213; *Mooney v. Kennett*, 19 *Id.* 551; see "*Complaints*," p. 209, Note 28.

20. Several Counts.—A complaint which contains a count setting forth the facts attending the purchase of a county warrant by plaintiff, and charging that defendants are liable upon an implied contract to repay the purchase money, and a second count charging defendants as indorsers of negotiable paper, and a third count in the usual form for money had and received, is not demurrable on the ground of a misjoin-

der of causes of action. (*Keller v. Hicks*, 22 *Cal.* 457.) In Iowa, a party may state in one count a cause of action on a note, and in another a cause of action on the consideration of a note. *Camp v. Wilson*, 16 *Iowa*, 225; see *Complaints*," p. 209.

21. Specific Performance.—*A claim for specific performance of a contract to convey real estate, and for payment of a reasonable sum for use and occupation, is not setting up two distinct causes of action which cannot be united.* (*Spier v. Robinson*, 9 *How. Pr.* 325.) Grantor with warranty, and holder of an incumbrance, may be joined, to obtain satisfaction of such incumbrance, and a recovery over for any amount found due on it. *Wandle v. Turney*, 5 *Duer*, 661.

22. Specific Personal Property.—*Claims for the recovery of specific personal property, with or without damages for the withholding thereof.* (*Cal. Pr. Act*, § 64.) Replevin and fraud may be united. *Truebody v. Jacobson*, 2 *Cal.* 269.

23. Specific Real Property.—*Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits on the same, may be united.* (*Cal. Pr. Act*, § 64; *Sullivan v. Davis*, 4 *Cal.* 291; *Hoffman v. Tuol. Water Co.*, 10 *Id.* 413; *Gale v. Tuol. Water Co.*, 14 *Id.* 25; *Hotchkiss v. Auburn and Rochester R.R. Co.*, 36 *Barb.* 600.) *A complaint in ejectment may be for two separate and distinct pieces of land, but the causes of action must be separately stated, and affect all the parties to the action, and not require different places of trial.* (*Boles v. Cohen*, 15 *Cal.* 150.) Otherwise it would appear that the old form of declaring in ejectment by separate counts is no longer admissible. *St. John v. Pierce*, 22 *Barb.* 362.

24. Specific Relief.—*Claims by a debtor to have obligations delivered up and canceled, and an account of the securities pledged for them, and payment of the overplus, is but one cause of action.* (*Cahoon v. Bank of Utica*, 7 *N.Y.* 486; *S.C.*, 7 *How. Pr.* 401; reversing *Id.* 134.) A cause of action for reformation of mortgage, and for simultaneous foreclosure, may be united. (*Depuyster v. Hasbrouck*, 1 *Kern.* 582.) So, suit against indorser for liability on note, and for decree against mortgagor foreclosing the mortgage, may be united. (*Rollins v. Forbes*, 10 *Cal.* 299; *Eastman v. Turman*, 24 *Cal.* 382.) Claim to reform assignment in part, and for accounting under it when reformed. (*Garner v. Wright*, 28 *How. Pr.* 92.)

25. Trespass.—In Massachusetts, under trespass, the several species of *quare clausam* and *de bonis asportatis*, may be joined. (Bishop *v.* Baker, 19 *Pick*, 517.) Counts in trespass upon the case may be joined with a count in trover. (Ayer *v.* Bartlett, 9 *Pick*. 160.) So, a cause of action for cutting wood, and also one for the conversion of the wood, may be combined. Rodgers *v.* Rodgers, 11 *Barb.* 595; see "*Complaints*," pp. 214-215.

COMPLAINTS—SUBDIVISION THIRD.

Upon Written Instruments for the Payment of Money Only.

CHAPTER I.

NEGOTIABLE PAPER, BONDS, ETC.

No. 189.

i. Against Maker.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant made a certain instrument in writing, of which a copy is hereto annexed and made a part hereof [*or* an instrument in writing in the words and figures following, to wit:]

II. That by the terms of said written instrument, the defendant became indebted to the plaintiff in the sum of dollars.

III. That the plaintiff has fully performed all the conditions thereof on his part.

IV. That defendant has not paid the same.

[*Demand of Judgment.*]

1. Altered Instrument—Onus Probandi.—A party who claims under an instrument which appears upon its face to have been

altered, is bound to explain the alteration. But not so, when the alteration is averred by the opposite party, and it does not appear upon the face of the instrument. (*United States v. Linn*, 1 *How. U.S.* 104.) The alteration of the number of a state bond, payable to bearer, and not required by law to be numbered, is immaterial, and though made with fraudulent intent, does not avoid it in the hands of a subsequent *bona fide* holder for value without notice. *Commonwealth v. Emigrant Industrial Savings Bank*, 98 *Mass.* 12.

2. Consideration, Allegation of.—Where a copy of the instrument declared on is set out in the complaint, and it purports to be for value received, that is a sufficient allegation of a consideration. *Jerome v. Whitney*, 7 *Johns.* 321; *Waldrad v. Petrie*, 4 *Wend.* 575; *Prindle v. Caruthers*, 15 *N.Y.* 425.

3. Consideration, Averment of.—That the defendant made the same for value received [*or made the same in consideration of goods theretofore sold and delivered to him by the plaintiff, or of services theretofore rendered to him by the plaintiff, at his request, or otherwise state its nature*].

4. Consideration, when Averred.—Where the instrument neither expresses a consideration, nor, as in the case of a sealed instrument or negotiable paper, imports one, a consideration should be averred. (*Spear v. Downing*, 12 *Abb. Pr.* 437.) Where the instrument requires a consideration to support it, the consideration must be averred in the complaint. *Prindle v. Caruthers*, 10 *How. Pr.* 33; *Joseph v. Holt*, *Cal. Sup. Ct., Apl. T.*, 1869.

5. Consideration, when not Averred.—In an action on a written instrument, it is not necessary to set out the consideration. (*Rector v. Fournier*, 1 *Mo.* 204; *Sloan v. Gibson*, 4 *Mo.* 32; *Caples v. Branham*, 20 *Mo.* 244.) In Iowa and Indiana, an agreement in writing imports a consideration. (*Tousley v. Olds*, 6 *Clark*, 526.) In a sealed instrument, the seal imports consideration. (*McCarty v. Beach*, 10 *Cal.* 461; *Willis v. Kempt*, 17 *Id.* 98; *Clark v. Thorpe*, 2 *Bosw.* 680.) So, in an undertaking to answer for the debt of another. *Bush v. Stevens*, 24 *Wend.* 256.

6. Construction.—In construing written instruments, the circumstances under which they were written, and the subsequent conduct of the parties, may be consulted. (*McNeil v. Shirley*, 33 *Cal.* 202.)

Under the Code, the recitals of an instrument averred in a complaint to have been executed by the defendant, have the same effect as specific averments of the truth of the facts recited. *Slack v. Heath*, 1 *Abb. Pr.* 331.

7. Construction Falsely Stated.—When the plaintiff sets out in his complaint the contract sued on in the terms in which it is written, and then puts a false construction on its terms, the allegation repugnant to its terms should be regarded as surplusage. (*Love v. S. N. L. W. and M. Co.*, 32 *Cal.* 639; *Stoddard v. Treadwell*, 26 *Cal.* 300.) Where a declaration contains an averment of a fact *dehors* the written contract, which is in itself immaterial, the party making such averment is not bound to prove it. *Wilson v. Codman*, 3 *Cranch*, 193.

8. Corporation Stock.—In Massachusetts, where a written agreement has been executed by one person only, by which he agreed to deliver to another, upon the formation of a coal company, and when the certificates should have been issued, a certain amount of the stock of the company, and the agreement recites that the person who was to receive the stock agreed, in consideration thereof, to sell a certain amount of the stock of the company at a specified valuation, and collect payment therefor, a declaration in an action against the signer of the agreement is demurrable, which does not allege that there was a consideration for the defendant's promise, or that the company has been formed, the certificates issued, or the specified amount of stock sold, and payment therefor collected by the plaintiff. *Murdock v. Caldwell*, 8 *Allen (Mass.)* 309.

9. Date of an Instrument.—In pleading a written instrument, *e.g.*, a release, if the only materiality of the date is that it was after another event, it is sufficient to say that it was so. *Kellogg v. Baker*, 15 *Abb. Pr.* 286.

10. Delivery.—A delivery of a deed need not be stated in a pleading, and it may be stated to have been made on a day other than its date. Time need not be averred, unless it be the essence of the contract. (*Cro. Eliz.* 178; *Cro. Jac.* 420; 2 *Ld. Raym.* 1,538; *Tompkins v. Corwin*, 9 *Cow.* 255; *Cecil v. Butcher*, 2 *Jac. & W.* 571; *Brinkerhoff v. Lawrence*, 2 *Sandf. Ch.* 400.) That an instrument was executed, imports a delivery. (2 *J. & W.* 571; *Brinkerhoff v. Lawrence*, 2 *Sandf. Ch.* 400.) The delivery of a promissory note is sufficiently averred by implication, and indorsement is unnecessary to transfer the title. *Purdy v. Vermilyea*, 8 *N.F.* 246.

11. Executed Implies Subscribed.—An averment that an agreement was “executed,” amounts to an averment that it was “subscribed” by the party to be charged. (*Cheney v. Cook*, 7 *Wis.* 413.) If, in pleading a deed executed by a married woman, the pleader states that it was executed by attorney, he must also state the facts which make the case one in which such mode of execution is valid, or his pleading is demurrable. *Johnson v. Taylor*, 15 *Abb. Pr.* 339.

12. Foreign Language.—If the instrument is in a foreign language it is sufficient on demurrer to set it forth in that language. (*Nourny v. Dubosty*, 12 *Abb. Pr.* 128.) But it is better to plead it according to its legal effect.

13. Genuineness Deemed Admitted.—When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the answer denying the same be verified. (*Pr. Act*, § 53.) This section extends only to those parties who are alleged to have “signed” the instrument. (*Heath v. Lent*, 1 *Cal.* 411.) Therefore if the action is against an administrator, the genuineness of the signature must be proved. (*Id.*) So, proceedings which are void by reason of the infirmity of the statute under which they are had, are not cured by an averment in a complaint that they were duly and legally had; and a failure to deny the averment in the answer is not an admission that the proceedings were valid or legal. *People v. Hastings*, 29 *Cal.* 449.

14. Identity.—Where the note was made payable to G. W., and the plaintiff named himself as Gilbert W., it was held that he should be presumed the same person. (*Marshall v. Rockwood*, 12 *How. Pr.* 452.) Where the note was signed in the name of one of the partnership “& Co.,” and in the action the defendants were named individually, it was held sufficient. *Butchers’ and Drovers’ Bank v. Jackson*, 15 *Abb. Pr.* 218; *S.C.*, 24 *How. Pr.* 204.

15. Indebtedness of Defendant.—If a complaint should only allege that defendant was indebted to plaintiff in a named sum, which defendant refused to pay, it would be insufficient. It must allege the facts which constitute the indebtedness. *Piercy v. Sabin*, 10 *Cal.* 28.

16. Indorsement of Sealed Instrument.—*Assumpsit* may be brought on the unsealed indorsement of a sealed writing. *Campbell v. Jordan*, *Hempst.* 534.

17. Interest of Parties.—Where the covenant purported to be made between two persons by name, of the first part, and the corporate company, of the second part, and only one of the persons of the first part signed the instrument, and the covenant ran between the party of the first part and the party of the second part, it was proper for the person who had signed on the first part to sue alone; because the covenant inured to the benefit of those who were parties to it. *Phil. W. and B. R.R. Co. v. Howard*, 13 *Howard U.S.* 308.

18. Issue of Warrant.—Averring the issue of a warrant imports a seal, if the case is one in which a seal is necessary. *Beekman v. Traver*, 20 *Wend.* 67.

19. Legal Effect.—The legal effect of written documents offered in evidence is a question for the court, and not for the jury. *Carpentier v. Thirston*, 24 *Cal.* 268.

20. Lost Instrument.—A party need not plead loss of an instrument. (*McClusky v. Gerhauser*, 2 *Nev.* 47.) A motion to make a pleading more definite and certain, by setting forth the contents of a written instrument relied on by the pleader, should not prevail where it appears that the instrument is lost, and the pleading apprises the adverse party of the nature and effect of the instrument. *Kellogg v. Baker*, 15 *Abb. Pr.* 286.

21. Missouri.—In actions on written instrument, plaintiff must set out its legal effect. (*Moore v. Platte County*, 8 *Mo.* 467.) Under the Practice Act of 1849, in Missouri, the instrument does not become part of the complaint, nor is it necessary that it should be included in the copy of the complaint. *Hadwen v. Home Mut. Ins. Co.*, 13 *Mo.* 473.

22. New Promise, when to be Alleged.—In actions upon written instruments for the payment of money, as promissory notes, the date being shown, shows the period when the right of action accrues. In such cases, any new promise which has been made, renewing or continuing the contract, should be alleged. *Smith v. Richmond*, 19 *Cal.* 481.

23. Ohio.—In Ohio, this provision under the statute extends to accounts and other instruments "for the unconditional payment of money only." But a judgment cannot be so pleaded. *Memphis Med. College v. Newton*, 2 *Handy*, 163.

24. Promissory Notes.—When a copy of the promissory note is annexed, and the answer is not verified, the due execution and genuineness of the note is admitted. (*Burnett v. Stearns*, 33 *Cal.* 468; *Horn v. Volcano Wat. Co.*, 13 *Cal.* 62; *Kinney v. Osborne*, 14 *Cal.* 112.) So of a bond. (*Corcoran v. Doll*, 32 *Cal.* 83.) And if the complaint contains a copy of the written instrument sued on, and is not verified, and the answer denies its execution, but is not sworn to, the note is admissible in evidence without proof of the genuineness of the signature. *Corcoran v. Doll*, 32 *Cal.* 83; *Horn v. The Volcano W. Co.*, 13 *Id.* 62; *Sacramento County v. Bird*, 13 *Id.* 66; *Burnett v. Stearns*, 33 *Cal.* 468.

25. Proof of Execution.—An instrument in writing, executed and attested by a subscribing witness in a foreign country, or beyond the jurisdiction of the court, can be proved by evidence of the handwriting of the party who executed it. *McMinn v. Whelan*, 27 *Cal.* 300.

26. Proof of Written Instrument.—The intent of the statute is fully carried out by excluding parol testimony to contradict a deed; but where parties admit the real facts of the transaction in their pleadings, these admissions are to be taken as modifications of the instrument; (*Lee v. Evans*, 8 *Cal.* 424;) as no proof is required of facts admitted or not denied. *Patterson v. Ely*, 19 *Cal.* 28; *Landers v. Bolton*, 26 *Id.* 416.

27. Reference to Counts.—Where a written instrument is made part of the complaint with both the first and second counts, and in the second count is referred to as already on file with the former, the latter will be sufficient. *Peck v. Hensley*, 21 *Ind.* 344.

28. Sealed Contract.—Where the sealing of an instrument is sufficient according to the laws of a state in which it was made, the remedy upon it in a state in which such mode of sealing is not sufficient must be according to the law of the latter state instead of the former. Thus, in New York, an action on a deed sealed with a scroll, must be an action appropriate to unsealed instruments. (5 *Johns.* 239; 12 *Id.* 198; 3 *Hill*, 228, 544; 1 *Den.* 376; 4 *Cow.* 508; 4 *Kent.* 451; 8 *Pet.* 362; *Story's Confl. of L.* 47; 3 *Gill. & F.* 234; 6 *N.H.* 150; *Le Roy v. Beard*, 8 *How. Pr.* 451.) An impression of the seal of a corporation stamped upon the paper on which a mortgage of the corporation is written, is a good seal, although no adhesive substance is used. *Hendee v. Pinkerton*, 14 *All. (Mass.)* 381.

29. Specialty.—In declaring on a specialty, it must be averred that it was sealed by the defendant. Setting it forth, with its conclusion that it was signed and sealed with the name of the defendant and with an L. S., is not sufficient. (1 *Saund.* 291; 1 *Chitt. Pl.* 109; *Van Santvoord v. Sandford*, 12 *Johns.* 197; *Macomb v. Thompson*, 14 *Id.* 207; to much the same effect, *Stanton v. Camp*, 4 *Barb.* 274; *Cabell v. Vaughan*, 1 *Saund.* 291; compare *Jenkins v. Pell*, 17 *Wend.* 417.) Although “indenture,” “deed,” “writing obligatory,” were held to import a seal. *Cabell v. Vaughan*, 1 *Saund.* 291; *Phillips v. Clift*, 4 *Hurlst. & N.* 168.

30. Specialty, Delivery of.—The delivery of a specialty, though essential to its validity, need not be stated in a pleading. It is enough to allege that it was made by the defendant, as that implies delivery. 1 *Chitt. Pl.* 348; 1 *Saund.* 291; 10 *How. Pr.* 274; 12 *Id.* 452; 15 *N.Y.* 425; *La Fayette Ins. Co. v. Rogers*, 30 *Barb.* 491.

31. Stamp.—A complaint upon a written instrument need not allege that such instrument is stamped. (*Hallock v. Jaudin*, 34 *Cal.* 167.) That part of the internal revenue law which attempts to take away the remedy on certain private contracts in writing if they are not stamped, is unconstitutional. (*Hunter v. Cobb*, 1 *Bush (Ky.)* 239.) Declaration of trust does not require stamp. A mere declaration in writing that the person making it holds land conveyed to him in trust for another, is not such a conveyance or instrument as requires either a United States or a state revenue stamp. *Sime v. Howard*, 4 *Nev. Rep.* 473.

32. Subscription.—The word “agent,” appended to the signature of the agent, is not mere *descriptio personæ*. It is the designation of the capacity in which he acted. (*Sayre v. Nichols*, 7 *Cal.* 535; see *Tolmie v. Dean*, *Wash. Terr.* 60.) That “executed” implies “subscribed,” see (*Cheney v. Cook*, 7 *Wis.* 413.) Where a contract purported upon its face to have been made by an agent, and it is set forth in full in the complaint, it must be alleged that the agency was duly constituted. *Regents v. Detroit Society*, 12 *Mich.* 138.

33. Terms, how Construed.—All the terms of the promise, including the kind of money in which the payment is to be made, are to be ascertained by an inspection and construction of the instrument. *Burnett v. Stearns*, 33 *Cal.* 468.

34. Under Seal.—Where the law requires an instrument to be

under seal to authorize a particular remedy thereon, it is necessary to state that it is under seal. But where it is wholly immaterial whether the instrument was or was not under seal, an averment that it was in writing is supported by the production of a written instrument, either with or without a seal attached. *Jenkins v. Pell*, 20 *Wend.* 450.

35. Varying Terms.—Parol evidence is admissible to vary the terms of a written contract. *Lennard v. Vischer*, 2 *Cal.* 37.

36. Writing Implied.—An award set forth, “as in the form following,” and with a date, may be presumed to have been in writing. (*Munro v. Alaire*, 2 *Cal.* 320.) When the terms and conditions of an agreement are set out in a complaint, and the violation of that agreement is charged against the defendant, if it is such an instrument as the law requires to be in writing, and the complaint is silent whether it was oral or in writing, courts will presume it was a lawful written instrument until the contrary appears. *Van Dorn v. Tjader*, 1 *Nev.* 380.

No. 190.

ii. *On a Bond for the Payment of Money only.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant covenanted with the plaintiff, under his hand and seal, to pay to the plaintiff the sum of dollars.

II. That he has not paid the same.

[*Demand of Judgment.*]

37. Breach, how Alleged.—It is not alone sufficient to show a technical breach of the literal terms of a covenant in a bond; but upon a reasonable interpretation of the intent and meaning of the covenant, to be ascertained from all its terms, it must likewise appear that some substantial right guarantied thereby has been infringed, or some of its purposes defeated. (*Levitsky v. Johnson*, 35 *Cal.* 41.) It is suggested

that specific breaches should be assigned, even on a mere money bond. *Western Bank v. Sherwood*, 29 *Barb.* 383.

38. Gold Coin.—In California, where the contract or bond was for payment in gold coin, it must be averred, and judgment demanded accordingly.

39. Guarantor.—What averments on a bond are sufficient to charge a guarantor, see *Tappan v. Cleveland R.R. Co.*, 4 *West. Law Month.* 67.

40. Mutilated Bond.—If the obligee tear off the seal or cancel a bond, in consequence of fraud and imposition practised by the obligor, he may declare on such mutilated bond as the deed of the party, making a proper averment of the special facts. 3 *Durnf. & E.* 153; *United States v. Spalding*, 2 *Mas.* 478.

41. What Written Obligation Imports.—The term “written obligation” imports a sealed instrument. (*Clark v. Phillips*, *Hempst.* 294.) Under the statutes of California, bonds are on the same footing as undertakings. *Canfield v. Bates*, 13 *Cal.* 606.

No. 191.

iii. *On a Bond—Pleading it according to its Legal Effect.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant covenanted with the plaintiff, under his hand and seal, to pay to the plaintiff the sum of [*state the actual debt*], in gold coin, on the day of, with interest from, etc. [*or otherwise according to the condition.*]

II. That he has not paid the same.

[*Demand of Judgment.*]

No. 192.

iv. *By a Surviving Oblgee, on a Joint Bond.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant covenanted with the plaintiff, and one R. N., under his hand and seal, to pay to the plaintiff and said R. N., the sum ofdollars.

II. That on the day of, 187., at, said R. N. died.

III. That no part thereof has been paid.

[*Demand of Judgment.*]

42. Averment of Death of Joint Oblgee.—One of two joint obligees cannot sue, unless he avers that the other is dead. Wherever, by reason of a several interest, one may sue, he must set forth the bond truly, and then by proper averments show a cause of action in himself alone. *Ehle v. Purdy*, 6 *Wend.* 629.

43. Joint and Several Bonds.—No recovery can be had on a bond, purporting to be the joint bond of the principal and sureties, but signed by the latter only. (*Sacramento v. Dunlap*, 14 *Cal.* 421.) It is otherwise as to a joint and several bond, where each signer is considered bound, without the signature of the others named as obligors. (*Id.*) Where a complaint is against two or three obligors, it must aver that all three have failed to pay the debt. (*Robins v. Pope*, *Hempst.* 219.) Under the statute of Indiana, the representatives of a deceased joint obligor may be sued on a joint and several obligation. (*Curtis v. Bowrie*, 2 *McLean*, 374.) A declaration in an action of debt against the obligor, setting forth a joint and several bond, cannot be annulled by adding a new count, setting forth a bond by the defendant and another person. *Postmaster-General v. Ridgeway*, *Gilp.* 135.

CHAPTER II.

BILLS OF EXCHANGE.

No. 193.

i. Foreign Bills—Payee against Drawer for Non-Acceptance.

[TITLE.]

The plaintiff complains, and alleges:

I. That on day of, 187., at, the defendant, by his bill of exchange, required one to pay to the plaintiff, in [Liverpool], [pounds sterling, sixty days] after sight thereof.

II. That on the day of, 187., the same was presented to the said, for acceptance, but was not accepted, and was thereupon duly protested.

III. That notice thereof was given to the defendant.

IV. That he has not paid the same.

V. [That the value of pounds sterling, at the time of the service of notice of protest on the defendant, was dollars.]

[Demand of Judgment.]

1. Definition.—A bill of exchange drawn in one state upon a person in another, is a foreign bill. (*2 Pet.* 589; *Dickens v. Beal*, 10 *Pet.* 572; *Buckner v. Finley*, 2 *Id.* 586; *Bk. of United States v. Daniel*, 12 *Id.* 32.) And such bills are by the custom of merchants, protested if dishonored. *Townsley v. Sumrall*, 2 *Pet.* 170.

2. Difference of Exchange.—On a bill of exchange, payable at a particular place, it *seems* that the difference of exchange may be recovered, if the declaration contains the proper averment; but this is not the rule where the action is on a note, and there is no count or allegation in the declaration to cover the rate of exchange. *Weed v. Miller*, 1 *McLean*, 423.

3. Non-Payment.—In a declaration on a foreign bill of exchange, for non-payment, no averment of a presentment for acceptance, or of a refusal and protest for non-acceptance of the bill is necessary. *Brown v. Barry*, 3 *Dall.* 365.

4. Notice of Protest.—In an action of debt under the statute of Virginia, by the holder of a bill of exchange against the indorser, it is necessary to allege in the declaration that notice of protest was given to the defendant. The Legislature in giving the action of debt to the holder of a bill of exchange, and giving it the dignity of a specialty, did not alter the commercial character of the paper in other respects. *Slocum v. Pomeroy*, 6 *Cranch*, 221; reversing *Cranch C. Ct.* 578.

5. Parties.—An agent to whom a bill of exchange has been indorsed in blank for collection, may fill up the assignment to himself, and bring suit in his own name. *Orr v. Lacy*, 4 *McLean*, 243.

No. 194.

ii. Payee against Acceptor.

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at [Havre, France], one C. D., by his bill of exchange, required the defendant to pay to the plaintiff, dollars [. days after sight thereof].

II. That on the day of, 187., at, the defendant accepted the said bill.

III. That he has not paid the same.

[Demand of Judgment.]

6. Acceptance.—In an action against B., as sole acceptor of a bill of exchange, the plaintiffs were entitled to recover under a count in the declaration, stating the bill to have been drawn on "B. & Co.," and to have been accepted by B., by the name and style of "B & Co.," by writing the name of "B. & Co." thereon. *City Bank of Columbus v. Beach*, 1 *Blatchf.* 438; Compare *Lapeyre v. Gales*, 2 *Cranch C. Cl.* 291.

7. Letter of Credit.—A letter of credit, promising unconditionally to accept bills drawn upon its faith, is an actual acceptance in favor of a person, who upon its faith receives a bill so drawn for a valuable consideration. *Naglee v. Lyman*, 14 *Cal.* 450.

8. Promise to Indorse.—A promise to indorse under a letter of credit representing a person to be good, and saying that the writer will indorse for him on a purchase to a certain amount, the writer is not liable directly for the amount of a sale without any request to indorse, and unless an indorsement is required no action can be maintained. 1 *M. & Selw.* 55; 16 *Johns.* 67; *Stockbridge v. Schoonmaker*, 45 *Barb.* 100.

No. 195.

i. *On Inland Bills—Drawer against Acceptor for Non-Payment.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, by his bill of exchange, he required the defendant to pay to him dollars [..... days after date, *or* at sight thereof].

II. That the defendant accepted the said bill.

III. That he has not paid the same.

[*Demand of Judgment.*]

9. Acceptance.—A promise that a drawer will pay a draft which may be drawn on him, is an acceptance, and he may be sued as acceptor. *Wakefield v. Greenhood*, 29 *Cal.* 597.

10. Acceptance, Date of.—If the bill is payable at a certain time after "sight," the date of acceptance should be stated; otherwise it is not necessary.

11. Acceptor.—A person, not personally a party to a bill of exchange, who for a consideration accepts the same, is an acceptor, equally as if he were drawee. (*Kelly v. Lynch*, 22 *Cal.* 661.) The loss of the acceptance by the drawee is a sufficient consideration for the acceptance by the third person. *Id.*

12. "After Sight."—A bill drawn payable so many days after sight, means after presentment for acceptance. *Mitchell v. Degrand*, 1 *Mass.* 175.

13. Corporations.—Where a draft is drawn by the president and secretary of a corporation upon its treasurer, no notice of presentation and non-payment is necessary to hold the corporation. (*Dennis v. Table Mt. Wat. Co.*, 10 *Cal.* 369.) The burden of proof is on the corporation to show that the drawee was provided with funds and ready to pay at maturity, in order to exempt them from damages and costs. 17 *Johns.* 248; *Fairchild v. Ogdensburgh, Clayton and Rome R.R. Co.*, 15 *N.Y.* 337.

14. Equities between Parties.—Where a creditor takes a bill before maturity, as collateral security for an antecedent debt, if there be any change in the legal rights of the parties, the creditor becomes the holder for value, and the bill is not subject to the equities between the parties. *Naglee v. Lyman*, 14 *Cal.* 450; *Robinson v. Smith*, *Id.* 95.

15. Form of Bill.—The following written order possesses all the requisites of an inland bill of exchange: "MR.: Please pay the bearer of these lines dollars, and charge the same to my account." (*Wheatley v. Strobe*, 12 *Cal.* 92.) The following document is a negotiable bill of exchange. "JULY 15, 1865. On 1st of August next, please pay to A., or order, £600, on account of moneys advanced by me to the S. Company. To Mr. W., Official Liquidator of the Company." *Griffin v. Weatherby*, *Law Rep.* 3 *Q. B.* 735.

16. "Or Order," "Or Bearer."—The words "or order," "or bearer," in notes, bills, and checks, are words of negotiability, and the use of either of them makes the paper negotiable, although impersonal

words are used in place of naming a payee. *Mechanics' Bank v. Steaiton*, 5 *Abb. Pr. (N.S.)* 11.

17. **"Please."**—The insertion of the word "please" does not alter the character of the instrument. (*Wheatley v. Strobe*, 12 *Cal.* 92.) "Value received" is not necessary to show a consideration. *Benjamin v. Tillman*, 2 *McLeau*, 213.

18. **Satisfaction of Demand.**—A bill of exchange operates only as a conditional payment, but if the creditor fails to present it for payment to the drawee, it becomes *pro tanto* a satisfaction of the demand. *Brown v. Cronise*, 21 *Cal.* 386.

19. **Who may Recover.**—A bill indorsed to the Treasurer of the United States may be sued and declared on in the name of the United States, and an averment that it was indorsed immediately to them is good. (*United States v. Barker*, 1 *Paine U.S.* 156.) Where the complaint stated the bill drawn on "B. & Co.," and to have been accepted by B. by the name and style of B. & Co., by writing the name of B. & Co., the plaintiff may recover, *City Bk. of Columbus v. Beach*, 1 *Blatf.* 438; compare *Lapeyre v. Gales*, 2 *Cranch. C. Ct.* 291.

No. 196.

ii. *The Same*—On a Bill Payable to Drawer's own Order, and not Negotiated.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiffs [under their firm name of A. B. C. & Co., by their bill of exchange, required the defendant to pay to the order of the plaintiffs dollars, days after date thereof [*or otherwise*].

II. That on the day of, 187., the defendant accepted the bill.

III. That he has not paid the same.

[Demand of Judgment.]

No. 197.

iii. *The Same—Bill Returned and Taken up.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff, by his bill of exchange, required the defendant to pay to one A. B. dollars, days after the date thereof.

II. That on the day of, 187., at, the defendants, upon sight thereof, accepted the same for value received.

III. That at maturity the same was presented for payment, but was not paid.

IV. That on the day of, 187, the same was returned to the plaintiff for non-payment, and the plaintiff, as drawer thereof, was then and there compelled to take up the same and to pay to the holder thereof the sum of dollars, being the amount of said bill, with damages and interest.

V. That no part of the same has been repaid.

[*Demand of Judgment.*]

20. Payable to Third Persons.—When the drawer sues on a bill payable to a third person, it is necessary to state that it was dishonored, taken up, and paid by the plaintiff. 2 *Chitt. Pl.* 148.

21. Sufficient Averment.—A complaint against the drawees of a bill, alleging that they had refused to accept, and that they had a settlement of accounts with the drawers, and that on such settlement the drawers had in their hands sufficient money to pay the bill, which they had agreed to pay, is sufficient. *Mittenbeyer v. Atwood*, 18 *How. Pr.* 330.

No. 198.

i. *By Acceptor, without Funds, against Drawer.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant became indebted to him for money advanced by him, and paid by him, upon a certain draft drawn by the defendant, bearing date on the day of, 187., whereby the defendant requested the plaintiff, days after date, to pay to one A. B. the sum of dollars.

II. That on the day of, 187., at, the plaintiff accepted said draft, and paid it.

[Or II. That the plaintiff accepted said draft, and paid the same at maturity.]

III. That at the time of the acceptance and payment of said draft, the plaintiff was without funds of the defendant in his hands to meet the same.

IV. That defendant has not paid the same.

[*Demand of Judgment.*]

No. 199.

ii. *The Same—By a Copartnership Firm against another Firm, on a Draft Accepted and Paid by Plaintiffs.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the defendants, then composing the firm of C. D. & Co.,

drew their certain bill of exchange, in said co-partnership name, at, and directed the same to the plaintiffs at, who then were and now are co-partners, doing business under the firm name of A. B. & Co., by which bill of exchange the said defendants requested the plaintiffs to pay to the order of said defendants, four months after date, the sum of dollars, for value received.

II. That said bill of exchange the plaintiffs afterwards accepted, and paid in full.

III. That no funds were provided by said defendants, either before or after the same was drawn as aforesaid for the payment thereof, and the plaintiffs have had no funds of said defendants at any time in their hands to pay the same.

[*Demand of Judgment.*]

No. 200.

i. *Payee against Drawer, for Non-Acceptance.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, by his bill of exchange, required one C. D. to pay to the plaintiff dollars [. . . . days after sight].

II. That on the day of, 187., the same was presented to the said C. D. for acceptance, but was not accepted.

III. That notice thereof was given to the defendant.

IV. That he has not paid the same.

[*Demand of Judgment.*]

23. Allegation Setting out Copy of Bill.—That on the day of, 187., at, the defendants made and delivered to the plaintiff their bill of exchange, of which the following is a copy: [*Copy of bill.*]

24. Allegation of Demand and Notice Excused by Waiver.—That the defendant, at the time said bill was transferred by him, waived as well the presentation of the same to said for payment, as notice of the non-payment thereof.

25. Allegation of Excuse for Non-Presentation—Bill Countermanded.—That on or about the day of, 187., said bill not then having been presented for acceptance [*or for payment*], the defendant countermanded the same by instructions to the said [*drawee*] not to accept or pay [*or, if payable at sight, not to pay*] the same; wherefore it was not presented.

26. Allegation of Excuse for Non-Presentation—Drawee not Found.—That on the, etc., due search and inquiry was made for said, at [*state the place of address*], that the same might be presented for acceptance, but he could not be found, and the same was not accepted.

27. Averment of Protest.—That said bill was duly protested at maturity, is sufficient to admit evidence of demand, neglect to pay, and notice of non-payment. (*Woodbury v. Sackrider, 2 Abb. Pr. 405.*) The holder of a bill, upon protest for non-acceptance, has an immediate cause of action against the drawer, and averments of demand of payment and protest might be rejected if the declaration counted properly for non-acceptance. (*Mason v. Franklin, 3 Johns. 202.*)

28. Necessary Averments.—In a complaint against the drawer of a bank check, or of a bill of exchange properly so called, it is necessary to aver either demand, and notice to the drawer of non-payment, or such facts as excuse demand and notice, *e. g.*, want of funds at bank. (*Shultz v. Dupuy, 3 Abb. Pr. 252.*)

No. 201.

- ii. *The Same—Form of Allegation where Bill was Payable at a Specific Date.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant made and delivered to the plaintiff his bill of exchange, directed to E. F., and required said E. F. to pay to the plaintiff dollars, on the day of, 187. [*or at sight, or days after date thereof, or after sight thereof*], for value received.

II. That the same was presented to E. F. for payment, but was not paid.

III. [*If a foreign bill.*] That the same was duly protested for non-payment.

IV. That notice thereof was given to the defendant.

V. That the defendant has not paid the same.

[*Demand of Judgment.*]

No. 202.

- i. *By Partners Payees, against Partners Acceptors.*

[TITLE.]

A. B. and C. D., the plaintiffs in the above entitled action, complain of E. F. and G. H., the defendants, and allege:

I. That at the times hereafter mentioned, the said plaintiffs were partners, doing business at,

under the firm name of "A. B. & Co.," and the said defendants were partners, doing business at, under the firm name of "E. F. & Co.

II. That on the day of, 187., at, L. M. and N. O., doing business under the firm name of "L. M. & Co.," under their said firm name, made their certain bill of exchange in writing, payable in gold coin of the United States, directed to the defendants, under their said firm name of "E. F. & Co.," bearing date on that day, in the words and figures following, to wit: [*Copy of bill*].

III. That on the day of, 187., at, the said defendants, under their said firm name of "E. F. & Co.," upon sight thereof, accepted said bill of exchange.

IV. That they have not paid the same.

[*Demand of Judgment.*]

29. Acceptance.—It is not necessary to copy the acceptance, nor even to aver that it was in writing. It is enough to aver its acceptance; (*Dewey v. Hoag*, 15 *Barb.* 368; *Horner v. Wood*, *Id.* 371; *Williams v. Ins. Co. of N. A.*, 9 *How. Pr.* 373; *Bk. of Lowville v. Edwards*, 11 *Id.* 216; *Fowler v. N.Y. Indem. Ins. Co.*, 23 *Barb.* 150; *Gibbs v. Nash*, 4 *Barb.* 449; *Murison v. Jones*, 13 *Id.* 466; *Haight v. Child*, 34 *Id.* 191; *Washburn v. Franklin*, 28 *Id.* 27; 7 *Abb. Pr.* 8; and see *dicta contra*, *Thurman v. Stevens*, 2 *Duer*, 609; *Le Roy v. Shaw*, 2 *Duer*, 628; *Merwin v. Hamilton*, 6 *Duer*, 248; 5 *Sand.* 68;) as the acceptance of a draft or bill of exchange *must* be in writing. (*Gen. Laws of Cal.* ¶ 427; *Wheatley v. Strobe*, 12 *Cal.* 92.) Where a draft is accepted conditionally, to be paid upon the happening of a contingency, the question whether it has happened is a question of fact. *Nagle v. Homer*, 8 *Cal.* 353.

30. Copy of Bill.—The holder must sue on that one of the set which was dishonored. (*Downes v. Church*, 13 *Pet.* 205; *Wells v.*

Whitehead, 15 *Wend.* 527.) Where a *second* of exchange was dishonored, and the *first* was subsequently paid previous to suit brought, the drawer was released from damages for the dishonor. *Page v. Warner*, 4 *Cal.* 395.

31. Drafts on Appropriation.—A draft payable in terms out of an “appropriation,” for work done by the acceptor, becomes due on payment for the work by Government. *Nagle v. Homer*, 8 *Cal.* 353.

32. Gold Coin.—Under the statute of California, if the written instrument provided for payment in *gold coin*, the complaint and demand for judgment should be for gold coin, and judgment will thereupon be entered up accordingly.

33. Non-Acceptance, Effect of.—The want of acceptance does not affect the right of the payee, only as to his mode of enforcing payment. *Wheatley v. Strobe*, 12 *Cal.* 92.

34. Notice.—Notice may be given to the indorser, or others entitled to notice, immediately after presentment to the maker or acceptor, and the refusal of the same to pay. (*McFarland v. Pico*, 8 *Cal.* 626.) Any notice is sufficient, if it informs the party of the fact. *Id.*; see *Minturn v. Fisher*, 7 *Cal.* 573.

35. Part Payment.—Where the drawee pays a part of the draft, and receipts on the back of the order the amount paid, and it is signed by the payee, it is not an acceptance. (*Bassett v. Haines*, 9 *Cal.* 260.) It is evidence that the drawee owed that amount and paid it. (*Id.*) The acceptance of a note of a third party by the creditor, is accompanied with the condition that the note shall be paid at maturity. *Griffith v. Grogan*, 12 *Cal.* 317.

36. Presentment.—In an action against the maker of a note, or the acceptor of a bill of exchange, in which the place of payment is fixed, it is not necessary to aver presentment at that place and refusal to pay. *Montgomery v. Tutt*, 11 *Cal.* 307.

*No. 203.*ii. *Payee against Acceptor—Short Form.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the defendant accepted a bill of exchange made [*or purporting to have been made*] by one C. D., on the day of, 187., at, requiring the defendant to pay to the plaintiff dollars, after sight thereof.

II. That he has not paid the same.

[*Demand of Judgment.*]

37. Allegation, Setting out Copy of Bill.—That on the day of, 187., at, the defendant A. B. accepted and delivered to the plaintiff a bill of exchange, of which the following is a copy: [*Copy bill and acceptance.*] *Andrews v. Astor Bank*, 2 *Duer*. 629; *Levy v. Levy*, 6 *Abb. Pr.* 89.

38. Corporation.—Where defendant is a corporation, and the bill is accepted by the president thereof as such, an averment that he was president and as such authorized to accept, is not necessary. *Partridge v. Badger*, 25 *Barb.* 146; *Andrews v. Astor Bank*, 2 *Duer*. 629; *Price v. McClare*, 6 *Id.* 544.

39. Costs of Protests.—A claim for statutory damages and costs of protest, need not be set forth in the petition as a separate and distinct cause of action, disconnected from the claim on the bill. *Summit Co. Bank v. Smith*, 1 *Handy*, 575.

*No. 204.*iii. *The Same—Pleading the Legal Effect.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, one A. B., by his bill of exchange, in writing, dated on that day, required the defendants to pay to the order of the plaintiff dollars, days after said date [*or otherwise*], for value received.

II. That on the day of, 187., at, the defendant upon sight thereof, accepted said bill.

III. That he has not paid the same.

[*Demand of Judgment.*]

40. Consideration on Acceptance.—A written agreement to accept amounts to an acceptance, and no consideration need be shown. *Ontario Bank v. Worthington*, 12 *Wend.* 593.

41. Party in Interest.—In an action on a draft, brought by the Camden Bank against the drawer, after showing that the draft was made payable “to the order of W. B. Storm, cashier,” an averment that the defendant “delivered the said draft to W. B. Storm, cashier of said Camden Bank, for the said bank,” and that “the said draft is now held and owned by the said plaintiffs, and still remains due to them from the defendants,” sufficiently shows that the bank and not the cashier is the real party in interest. *Camden Bank v. Rodgers*, 4 *How. Pr.* 63; S.C., 2 *Code R.* 45.

42. Presentment.—Against the acceptor, it is not necessary to aver or prove presentment at the place where the bill was made payable. *Foden v. Sharp*, 4 *Johns.* 183; *Wolcott v. Van Santvoord*, 17 *Id.* 248; *Caldwell v. Cassidy*, 8 *Cow.* 271; *Haxton v. Bishop*, 3 *Wend.* 13; *Green v. Goings*, 7 *Barb.* 652.

43. Promise to Accept.—In an action brought upon a promise made by the defendant to accept a draft which another might draw on him, it is not necessary to aver that the promise was in writing. *Wakefield v. Greenwood*, 29 *Cal.* 597; *Bank of Lowville v. Edwards*, 11 *How. Pr.* 216; and see *Chalie v. Belshaw*, 6 *Bing.* 529; *S.C.*, 19 *Eng. Com. L. R.* 240; and see, also, forms prescribed in the English rules of court, 1 *Chitt. Pl.* 723.

No. 205.

iv. *The Same—Acceptance Varying as to Time from the Bill.*

[TITLE.]

I. [*Allege making of bill as in preceding form.*]

II. That on the day of, 187., at, the defendant [*or the defendants under their firm name*], upon sight thereof, accepted the same payable at days [*or otherwise*] after the date of said bill [*or after said day of acceptance*].

III. That he has [they have] not paid the same.

[*Demand of Judgment.*]

No. 206.

v. *Where Drawer is also Acceptor, on Bill Drawn on Himself.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant made and accepted, and delivered to the plaintiff, his bill of exchange in writing, of which the following is a copy: [*Copy of the bill and acceptance.*]

II. That he has not paid the same.

[*Demand of Judgment.*]

No. 207.

vi. *By Assignee of a Bill Payable out of a Particular Fund.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, one A. B. made his bill of exchange or order in writing, dated on that day, and directed it to the defendant, and thereby required the defendant to pay to one C. D., out of the proceeds of [*state fund as in the bill*], dollars, days after the date thereof, and delivered it to said C. D.

II. That on the day of, 187., at, upon sight thereof, the defendant accepted the same, payable, when in funds, from the proceeds of [*etc., as in acceptance*].

III. That on the day of, 187., at, said C. D. assigned said bill to this plaintiff.

IV. That on the day of, 187., the defendant had funds of the said A. B., proceeds of, etc.

V. That on the day of, 187., at, the plaintiff demanded payment thereof from the defendant.

VI. That he has not paid the same.

[*Demand of Judgment.*]

44. That Defendant Accepted.—An acceptance generally without words of restriction to a fund or contingency, will in some case bind the acceptor absolutely. *Atkinson v. Manks*, 1 *Cow.* 691; *Mabe v. Massias*, 2 *W. Blackst.* 1,072; *Lent v. Hodgman*, 15 *Barb.* 274.

No. 208.

- i. *Payee against Drawer and Acceptor—On a Bill Accepted by the Drawee.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, A. B., by his bill of exchange, required one C. D. to pay to the plaintiff dollars, days after the date thereof [*or otherwise*].

II. That on the day of, 187., the defendant C. D., upon sight thereof, accepted said bill.

III. That at maturity the same was presented to the defendant C. D., for payment, but was not paid.

IV. That notice thereof was given to the defendant A. B.

V. That no part of the same has been paid.

[*Demand of Judgment.*]

No. 209.

- ii. *By Payee, on a Bill Accepted for Honor.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the defendant A. B., by his bill of exchange, required one C. D. to pay to the plaintiff dollars, days after the date thereof [*or otherwise*].

II. That on the day of, 187., the

same was presented to the said C. D. for acceptance, but was not accepted.

III. That notice thereof was given to the defendant A. B.

IV. That on the day of, 187., at, the defendant E. F. [*acceptor for honor*], upon sight thereof, accepted said bill for the honor of said A. B.

V. That at maturity the same was presented for payment to said C. D., but was not paid.

VI. That notice thereof was given to the defendant A. B.

VII. That thereupon, the same was duly presented to the defendant E. F. [*acceptor for honor*], for payment, but was not paid.

VIII. That notice thereof was given to the defendant A. B.

IX. That no part of the same has been paid.

[*Demand of Judgment.*]

46. Accommodation Acceptor.—The accommodation acceptor who pays without funds, can recover from the drawer, not upon the bill, but for money paid. *Griffith v. Reed*, 21 *Wend.* 502; *Suydam v. Westfall*, 4 *Hill*, 211; see "*Complaints on Money Paid*," p. 481.

47. Presentment at Maturity.—In a complaint against acceptor for honor, the plaintiff must show that the bill was presented at maturity to the drawee, and that the drawer had notice of non-payment. (*Williams v. Germanie*, 7 *Barnw. & C.* 468; *Schofield v. Bayard*, 3 *Wend.* 488;) The word "*duly*," when applied to a single specific averment, has no comprehensive force and meaning, so as to make the use of that word tantamount to an averment of every other fact necessary to make the presentment which is averred, a legal presentment. Dis-

approving of *Gay v. Paine*, 5 *How. Pr. R.* 107; *Woodbury v. Sackrider*, 2 *Abb. Pr. R.* 402; *Graham v. Machado*, 6 *Duer.* 515; see p. 131, Note 31.

No. 210.

i. *By Indorsee—First Indorsee against Acceptor.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the defendant accepted a bill of exchange, made by one A. B., on the day of, 187., at, requiring the defendant to pay to the order of one C. D. dollars, after sight thereof.

II. That the said C. D. indorsed the same to the plaintiff.

III. That the defendant has not paid the same.

[*Demand of Judgment.*]

No. 211.

ii. *First Indorsee against First Indorser.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to the plaintiff a bill of exchange, made by one A. B., on the day of, 187., at, requiring one C. D. to pay to the order of the defendant dollars, [days] after sight [*or* after date, *or* at sight] thereof, [and accepted by the said C. D. on the day of, 187.], at

II. That on the day of, 187., at, the same was presented to the said for payment, but it was not paid.

III. That notice thereof was given to the defendant.

IV. That he has not paid the same.

[*Demand of Judgment.*]

No. 212.

iii. *First Indorsee, against Drawer and Indorser—for Non-Acceptance.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, by his bill of exchange, required one C. D. to pay to the order of one E. F. dollars, days after the date thereof [*or otherwise*].

II. That the said A. B. then and there delivered the same to the defendant E. F., who then and there indorsed it to the defendant G. H.

III. That on the day of, 187., at, the defendant G. H. indorsed the same to the plaintiff for value.

IV. That the same was presented to C. D. for acceptance, but was not accepted [*if a foreign bill, add, and was thereupon duly protested for non-acceptance*], of all which due notice was given to the defendants.

V. That no part of the same has been paid.

[*Demand of Judgment.*]

48. Delivery.—The plaintiff, as indorsee of a bill of exchange, sued the acceptor, declaring under the statute of N.Y., on the money

counts, and appending a copy of the bill, with notice that it was his cause of action; but in the copy his indorsement was omitted. Delivery was sufficiently averred by implication, that indorsement was not necessary to pass title, and that the bill was therefore admissible upon the trial of the cause. *Purdy v. Vermilyea*, 4 *Seld.* 346.

49. Form.—For authority for a longer but similar form, see *Phelps v. Ferguson*, 9 *Abb. Pr.* 206; *Greenbury v. Wilkins*, *Id.*

No. 213.

iv. First Indorsee against all Prior Parties, for Non-Payment.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant A. B., by his bill of exchange, requested C. D. to pay to the order of E. F. dollars, days after the date thereof.

II. That the said A. B. then and there delivered the same to the said E. F., who thereupon indorsed it to the defendant G. H.

III. That on the day of, 187., at, the said G. H. indorsed the same to the plaintiff for value.

IV. That on the day of, 187., at, the defendant C. D., upon sight thereof, accepted said bill.

V. That at maturity the same was presented to the defendant C. D. for payment, but was not paid [*if a foreign bill, add*, and was thereupon duly protested for non-payment], of all which due notice was given to the defendants A. B., E. F., and G. H.

VI. That no part of the same has been paid.

[*Demand of Judgment.*]

*No. 214.**v. Subsequent Indorsee, against Acceptor.*

[TITLE.]

I. [*Allege acceptance of bill, as on Form 210.*]*

II. That by the indorsement of said, the same was transferred to the plaintiff for value.

III. That the defendant has not paid the same.

[*Demand of Judgment.*]*No. 215.**vi. Subsequent Indorsee against First Indorser—Indorsement Special.*

[TITLE.]

The plaintiff complains, and alleges :

I. That the defendant indorsed to one C. D. a bill of exchange, made by one A. B., on the day of, 187., at, requiring E. F. to pay to the order of the defendant dollars, days after sight thereof [*or otherwise*], and accepted by the said E. F. on the day of, 187., at

II. That the same was by the indorsement of the said C. D., transferred to the plaintiff.

III. That on the day of, 187., at, the same was presented to the said E. F. for payment, but it was not paid.

IV. That notice thereof was given to the defendant.

V. That he has not paid the same.

[*Demand of Judgment.*]

No. 216.

vii. *Subsequent Indorsee against Intermediate Indorser.*

[TITLE.]

The plaintiff complains, and alleges:

I. That a bill of exchange made by one A. B. on the day of, 187., at, requiring one C. D. to pay to the order of one E. F. dollars, days after sight thereof [*or otherwise*], [accepted by said C. D.], and indorsed by the said E. F. to the defendant, was, by the indorsement of the defendant [and others], transferred to the plaintiff.

[*Allege presentment, notice, and non-payment as in Form 211.*]

[*Demand of Judgment.*]

No. 217.

viii. *Subsequent Indorsee against Last Indorser.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to him a bill of exchange, made [*or purporting to have been made*] by one A. B., on the day of, 187., at, requiring one C. D. to pay to the order of one E. F. dollars, days after sight thereof [*or otherwise*], [accepted by the said C. D.], and indorsed by the said E. F. to the defendant.

II. That on the day of, 187., at, the same was presented to the said C. D. for payment, but it was not paid.

III. That notice thereof was given to the defendant.

IV. That he has not paid the same.

[*Demand of Judgment.*]

No. 218.

ix. *Subsequent Indorsee against all Prior Parties—Short Form.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant A. B., by his bill of exchange, required the defendant C. D. to pay to the order of the defendant E. F. dollars days after sight thereof.

II. That on the day of, 187., the said C. D. accepted the same.

III. That the said E. F. indorsed the same to the plaintiff.

IV. That on the day of, 187., the same was presented to the said C. D. for payment, but was not paid.

V. That notice thereof was given to the other defendants.

VI. That they have not paid the same.

[*Demand of Judgment.*]

No. 219.

x. *The Same—by a Bank in its Corporate Name.*

[STATE AND COUNTY.]

[COURT.]

THE BANK OF <i>against</i> A. B., C. D., and E. F.	}
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The plaintiff, a corporation duly organized and incorporated under the laws of the State of, complains, and alleges.

[*Allegations same as in last form.*]

[*Demand of Judgment.*]

No. 220.

i *Checks—Payee against Drawer.*

[TITLE.]

The plaintiff complains, and alleges :

I. That at the times hereinafter mentioned, the said defendants were partners, doing business as merchants at, under the firm name of C. D. & Co.

II. That on the day of, 187., at, the defendants, under their said firm name of C. D. & Co., made their check in writing, dated on that day, payable to the order of the plaintiff, which said check is in the words and figures following, to wit: [*Copy of check.*]

III. That the said check was presented on the day of, 187., to the said, for payment, but was not paid.

IV. That notice thereof was given to the defendants.

V. That they have not paid the same.

[*Demand of Judgment.*]

49. After Dishonor.—A party taking a check after presentment and dishonor, takes it subject to all the equities to which it was subject in the hands of the original holder. (*Fuller v. Hutchings*, 10 *Cal.* 523.) When the holder of a note accepts a draft or check in payment, he is not bound to give up the note before payment of the draft or check. (*Smith v. Harper*, 5 *Cal.* 329.) The surrender of the note is *prima facie* evidence of its payment. *Id.*

50. Checks.—Checks are on the same footing as bills of exchange, excepting the difference which may arise from the custom of merchants. (*Minturn v. Fisher*, 4 *Cal.* 35.) The legal presumption is that a check is drawn for money due from the drawer. *Headley v. Reed*, 2 *Cal.* 322.

51. Consideration.—The presumption is that the check was given on a valid consideration, but this presumption being rebutted, plaintiff must prove that he received it in good faith, and without notice of the illegality of the consideration. *Fuller v. Hutchings*, 10 *Cal.* 523.

52. Consideration Void.—A check given for a gaming debt is void in the hands of all persons, except a *bona fide* holder without notice. *Fuller v. Hutchings*, 10 *Cal.* 523.

53. Grace.—Sight checks are sight bills, and by our statute are not entitled to grace. See "*Promissory Notes*," Chap. iii. Note 74; *Minturn v. Fisher*, 4 *Cal.* 35.

54. Lost Paper.—Where a check had been lost and paid by the banker upon a forged indorsement, in a suit for the same where the banker refused to deliver the check to the owner, in the absence of rebutting testimony the measure of damages is the full amount for which it was drawn. *Larvey v. Wells*, 5 *Cal.* 124.

55. Non-Negotiable Draft.—A non-negotiable draft, rendered so by the absence of any fixed amount, may be rendered negotiable by an indorsement, "balance due dollars," and signed by in-

dorser, who is estopped thereby from setting up against it any antecedent matter, and is liable for the full amount. (*Garwood v. Simpson*, 8 *Cal.* 101.) No right of action can accrue upon a draft till payment. *Wakeman v. Vanderbilt*, 3 *Cal.* 380.

56. Notice.—In general, presentment and notice of non-payment are necessary to charge the drawer of a check. *Harker v. Anderson*, 21 *Wend.* 372; *Shultz v. Depuy*, 3 *Abb. Pr.* 252; but compare *Cruger v. Armstrong*, 3 *Johns. Cas.* 5; *Conroy v. Warren*, *Id.* 259.

57. Presentment.—As against the drawer, presentment at any time before suit brought is sufficient, unless it appear that he has been prejudiced by unreasonable delay. (*Little v. Phoenix Bank*, 2 *Hill*, 425; *Harbeck v. Craft*, 4 *Duer*, 122.) By the law merchant, it is sufficient if a check drawn upon one day be presented for payment in the usual banking hours on the next succeeding day. (*Ritchie v. Bradshaw*, 5 *Cal.* 228.) The payee, to hold the drawer, is bound to use reasonable diligence. *Id.*

57. Payment Stopped.—The complaint alleged demand, refusal, and notice to defendants of non-payment, and also that before the demand the defendant had stopped its payment by notice to the officers of the bank not to pay it. The answer denied that the defendants had notice of the non-payment, and alleged that they stopped its payment because it was obtained from them by fraud, of which, as well as of its payment having been stopped, the plaintiffs had notice before they took the check. *Held*, that the allegation in the complaint, of notice to the defendants of non-payment, might be disregarded as surplusage; and the plaintiffs should be allowed to prove, under the pleadings, the fact that payment had been stopped. That excused the want of notice. *Purchase v. Mattison*, 6 *Duer*, 587.

59. To Bearer.—A check payable to the order of a fictitious person, *e.g.*, of a firm long since dissolved, (*Stevens v. Strang*, 2 *Sandf.* 138,) or "to the order of bills payable," (*Willets v. Phoenix Bank*, 2 *Duer*, 121,) is to be deemed payable to bearer, if negotiated by the maker.

60. When Due.—When no time of payment is mentioned, the check or note is payable immediately, and complaint should not state a time of payment. *Herrick v. Bennett*, 8 *Johns.* 374; *Pearsol v. Frazer*, 14 *Barb.* 564; *Thompson v. Ketcham*, 8 *Johns.* 189.

*No. 221.*ii. *Indorsee or Bearer of Check, against Drawer.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant made his check in writing dated on that day, and directed the same to the Bank of A. B., requiring said Bank to pay to one C. D., or order [*or bearer*], dollars for value received.

II. That the defendant then and there indorsed the same to this plaintiff.

III. That on the day of, 187., at, the same was presented to said Bank of A. B. for payment, but was not paid.

IV. That notice thereof was given to the defendant.

V. That he has not paid the same.

[*Demand of Judgment.*]**61. Allegation of Excuse for Failure to give Notice.—**

That on the day of, 187., the same was presented to said [*drawee*] for payment, but the defendant had no funds with said drawee.

62. Allegation of Excuse—Want of Funds.—Want of funds in the drawee's hands excuses the omission to give notice of non-payment. As to whether it excuses non-presentment, see *Cruger v. Armstrong*, (3 *Johns. Cas.* 5; *Id.* 259; *Fitch v. Redding*, 4 *Sandf.* 130; *Franklin v. Vanderpool*, 1 *Hall*, 78; *Shultz v. Depuy*, 3 *Abb. Pr.* 252.) But where it is intended to rely upon want of funds as excusing demand or notice, that fact must be averred. *Shultz v. Depuy*, 3 *Abb. Pr.* 252; *Garvey v. Fowler*, 4 *Sandf.* 665; *Fitch v. Redding*, *Id.* 130; *Franklin v. Vanderpool*, 1 *Hall*, 78.

63. Allegation of Excuse from Insolvency of Drawee.—

That on the day of, 187., at, said [*drawee*] was insolvent [*or had stopped payment*].

64. Time.—The time should be stated, that it may appear whether

it was such as to excuse the holder from a demand. (1 *Chitt. Pl.* 289.) One who takes a check, which by its date appears to have been outstanding for two years and a half, and which has "Mem." written on its face, must bear the loss arising from his taking it without inquiry. *Skillman v. Titus*, 3 *Vroom*, 96.

65. Was Insolvent.—As against drawer, these facts dispense

with presentment and notice. *Lovett v. Cornwell*, 6 *Wend.* 369.

No. 222.

iii. *Indorsee or Bearer, against Drawer and Indorser.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, the defendant A. B. made his check, and directed the same to the Bank of C. D., and thereby required said C. D. to pay to the defendant E. F., or order [*or bearer*], dollars, for value received, and delivered it to the defendant E. F.

II. That thereupon said defendant, E. F., indorsed the same to this plaintiff for value.

III. That said check was duly presented for payment, but was not paid.

IV. That notice thereof was given to the defendants.

V. That they have not paid the same.

[*Demand of Judgment.*]

No. 223.

iv. *Against Bank, Drawee, having Certified.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a corporation, created by and under the laws of this State, organized pursuant to an act of the Legislature entitled "An act to Authorize the Business of Banking," passed , and the acts amending the same.

II. That on the day of , 187., at , one A. B. made his check, and directed it to the defendants, and thereby required them to pay to this plaintiff, or order [*or bearer*], dollars, for value received; and delivered the same to this plaintiff [*or, if payable to third party, state accordingly*].

III. That on the day of , 187., at , the defendant, by its agent duly authorized thereto, in writing, accepted and certified the same to be good.

IV. That thereafter the same was duly presented for payment, but no part thereof was paid.

[*Demand of Judgment.*]

66. Note.—In California we have no banking act, nor banking system, nor can paper money be issued by any bank within the State; certified checks are, however, issued by banks, as elsewhere.

67. Authority to Certify.—As to authority of bank officers to accept and certify, see *Willets v. Phoenix Bank*, 2 *Duer*, 121; *Farmers' Bank v. Butchers' and Drovers' Bank*, 4 *Id.* 219; *Claffin v. Farmers' and Citizens' Bank*, 23 *N.Y.* 293; *S.C.*, 24 *How. Pr.* 1.

68. Certified Check.—The certifying of a check as “good” transfers the sum drawn for to the holder, and imports a promise to pay to him on demand. But the drawee cannot set off a claim on the holder against the amount so transferred, and the maker of the check is not discharged. (*Brown v. Leckie*, 43 *Ill.* 497; *Bickford v. First National Bk. of Chicago*, 42 *Ill.* 238; *Rounds v. Smith*, *Id.* 245.) A check dated Jan. 10, 1866, was certified by the assistant cashier of defendant bank, and was indorsed to W., Dec. 1, 1865. Mar. 7, 1866, the check was deposited with the plaintiff, who credited W. with the amount on their books. The drawer of the check had not funds with defendants to meet it, either when it was certified, or when it was presented. *Held*, that W., as he took a post dated check, had notice that the cashier was exceeding his authority in certifying it, and that plaintiffs took subject to the equities against W. *Clarke Nat. Bk. v. Bk. of Albion*, 52 *Barb.* 592.

CHAPTER III.

ON PROMISSORY NOTES, AND CERTIFICATES OF DEPOSIT.

No. 224.

i. *Maker of Accommodation Note, having Paid it.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, the plaintiff made his promissory note, of which the following is a copy: [*Copy of note.*]

II. That the plaintiff never received any consideration therefor, but that it was an accommodation note, made and given to the defendant, at his request, and upon his promise that he would pay it at maturity.

III. That as the plaintiff is informed and believes, the

defendant thereafter and before its maturity negotiated it for value.

IV. That the defendant failed to pay the same at maturity, and that plaintiff paid it.

V. That defendant has not repaid the same.

[*Demand of Judgment.*]

1. Accommodation Maker as Plaintiff.—An accommodation maker or indorser is a surety, and may sue as such to recover payments made by him. (*Baker v. Martin*, 3 *Barb.* 634; *Neass v. Mercer*, 15 *Id.* 318.) For a form of complaint by accommodation maker, see (*Osgood v. Whittlesey*, 10 *Abb. Pr.* 134.) If the accommodation maker was sued, the allegation may state that, “the plaintiff was thereupon compelled, by suit brought against him by A. B., the holder, in the Court.” (*Packard v. Hill*, 7 *Cow.* 442.) And may recover the costs of suit. *Pars. Mer. Law*, 93; *Stratton v. Matthews*, 12 *Jur.* 924; *Baker v. Martin*, 3 *Barb.* 634.

No. 225.

ii. *Joint Maker of a Note, having Paid it, against the Other, for Contribution.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, this plaintiff and the defendant made their joint [*or joint and several*] promissory note in writing, of which the following is a copy: [*Copy note.*]

II. That at the maturity of said note, the plaintiff was compelled to pay, and did pay the same.

III. That no part thereof has been repaid to him.

[*Demand of Judgment.*]

2. Compulsory.—The payment must be compulsory to entitle the plaintiff to contribution, but this requires only a fixed and positive obligation, and suit is not necessary. 1 *Pars. on Cont.* 33; *Peck v. Ingersoll*, 7 *N.P.* 528.

No. 226.

iii. *By Indorser of Note, having Paid a Part.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, the defendant made his promissory note, whereby he promised to pay to the order of the plaintiff, days after date, the sum of dollars, for value received [*or copy the note*].

II. That thereafter, and before the maturity of said note, the plaintiff indorsed it and negotiated it for value.

III. That at the maturity it was presented for payment to the defendant [*or allege excuse for non-presentment*], but was not paid, whereof the plaintiff had due notice.

IV. That on the day of, 187., at, the plaintiff paid to one A. B., the holder thereof, the sum of dollars, the amount due on said note.

V. That no part thereof has been repaid to the plaintiff.

[*Demand of Judgment.*]

3. Legal Owner.—Where an indorser has paid the whole of a note and become the legal owner of it, he may sue for money paid. (*Baker v. Martin*, 3 *Barb.* 634; *Wright v. Butler*, 6 *Wend.* 290.) But

where he paid only a part, he must sue for the amount actually paid, as for money paid to the use of the drawer or first indorser. *Wright v. Butler*, *Id.* 284; affirming S.C., 20 *Johns.* 367; and 2 *Wend.* 369; *Pownal v. Ferrand*, 6 *Barn. & C.* 439; S.C., 13 *Eng. Com. L. R.* 230; *Baker v. Martin*, 3 *Barb.* 634; *Dygert v. Gros*, 9 *Id.* 506.

4. Separate Indorsers.—But separate prior indorsers cannot be joined as defendants in such an action. *Barker v. Cassidy*, 16 *Barb.* 177.

No. 227.

i. *Payee against Maker.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, by his promissory note, promised to pay to the plaintiff dollars, [days] after date, for value received [*or set out copy of note*].

II. That he has not paid the same [except dollars, paid on the day of, 187.].

[Demand of Judgment.]

5. Certificate of Deposit.—A certificate of deposit is on the same footing as a promissory note. (*Welton v. Adams*, 4 *Cal.* 37; *Brummagim v. Tallant*, 29 *Id.* 503.) It changes the character from a custodian of the funds to that of a debtor; (*Naglee v. Palmer*, 7 *Cal.* 543;) and the brokers become liable to pay to the holder of the certificate on its presentation. *McMillan v. Richards*, 9 *Cal.* 365.

6. Consideration.—In a complaint on a promissory note, it is not necessary that a consideration should be specially alleged. If there is no consideration, the defendant should set up the want of it as a defense. (*Winters v. Rush*, 34 *Cal.* 136.) Every note within the statute imports consideration. (*Bank of Troy v. Topping*, 13 *Wend.* 557; *Goshen Turnpike Co. v. Hurtin*, 7 *Johns.* 217; *Conroy v. Warren*,

3 *Johns. Cas.* 259; *Prindle v. Caruthers*, 15 *N.F.* 425.) An oral promise to convey land, in accordance with which the land is subsequently conveyed, is a sufficient consideration for a promissory note. (*Kratz v. Stocke*, 42 *Mo.* 351.) A covenant to convey is a good consideration for note for purchase money. (*Holy v. Rhodes*, 2 *Cranch*, 245; *Lane v. Dyer*, *Id.* 349.) But paying part of a note when all is due, is no consideration for an agreement to extend the time of payment. *Liening v. Gould*, 13 *Cal.* 598; consult Note 165, p. 166; and Note 2, p. 538.

7. Consideration, when Set out.—Though the holder of a promissory note which proves to be void, may in a proper case recover on the consideration for which the note was intended to be given, he cannot do so unless the pleadings set out such consideration. (*Waymaid v. Terreyson*, 4 *Nev.* 124.) Where an agreement of sale of personal property was signed by the purchaser only, who gave his note for the price, it might be inferred from the evidence of performance on seller's part, so as to constitute a consideration for the note. *Weightman v. Caldwell*, 4 *Wheat.* 85.

8. Copy of Note.—A complaint against a maker is sufficient where it sets forth a copy of the note, and alleges that a specified sum is due thereon from defendant to plaintiff, although the note is by its terms payable to a third person, and there is no allegation of an indorsement by him. 15 *N.F.* 425; *Continental Bk. v. Bramhall*, 10 *Bosw.* 595; consult Note 66, p. 222; and Note 24, p. 542.

9. Date—It is of no consequence whether the date of a promissory note be at the beginning or end of it. (*Sheppard v. Graves*, 14 *How. U.S.* 505.) The date of the note need not be stated. (*Coxon v. Lyon*, 2 *Camp.* 307; *Smith v. Lord*, 2 *Dowl. & L.* 761.) But as a variance would be immaterial (*Bentzing v. Scott*, 4 *Carr. & P.* 24), the plaintiff may transfer the allegation of time and place into one of date thus: That the defendant, by his promissory note, dated on, at, promised, etc:

10. Date, Variance.—A variance of one month in the time of a note described, was disregarded as immaterial, the defendant not having been misled. (*Trowbridge v. Didier*, 4 *Duer*, 448.) Where no time of payment is named, the note is due immediately; (8 *Johns.* 189; 15 *Wend.* 308; 6 *Barb.* 662; *Bell v. Sackett*, *Cal. Sup. Ct., Oct. T.*, 1869;) and interest runs from date, and without demand. On such a note a

count stating no time of payment is good. *Herrick v. Bennett*, 8 *Johns.* 374; consult Note 167, p. 166.

11. Delivery.—It is not necessary to add an averment of delivery where the plaintiff is the payee. "Made" imports delivery. (*Churchill v. Gardner*, 7 *T. R.* 596; *Chamberlain v. Hopps*, 8 *Verm.* 94; *Russell v. Whipple*, 2 *Cow.* 536; *Prindle v. Caruthers*, 15 *N.Y.* 425; *Keteltas v. Myers*, 19 *Id.* 231.) Indorsement likewise imports delivery. See *Post*, Form No. 237, Note 64; see *Ante*, p. 224, Note 73.

12. Demand.—No previous demand is necessary to maintain an action on a note payable on demand. (*Zeil v. Dukes*, 12 *Cal.* 482; *Story on Prom. Notes*, § 29.) The action itself is a sufficient demand, and if there were no days of grace allowed, the note would be payable immediately after delivery. (*Haxton v. Bishop*, 3 *Wend.* 13; *Bell v. Sackett*, *Cal. Sup. Ct., Oct. T.*, 1869.) But an indorser after maturity is entitled to demand and notice of non-payment before he is liable to pay. *Beebe v. Brooks*, 12 *Cal.* 308.

13. Demand—Place.—As against a maker or acceptor of a note drawn payable at a particular bank or place, it is not necessary to aver that a demand was made at the place specified. (*Wallace v. McConnell*, 13 *Pet.* 136; *Thompson v. Cook*, 2 *McLean*, 122; *Silver v. Henderson*, 3 *Id.* 165; *Ruggles v. Patten*, 8 *Mass.* 480; *Carley v. Vance*, 17 *Id.* 389; *Payson v. Whitcomb*, 15 *Pick.* 212.) But with the indorser the rule is different. *United States v. Smith*, 11 *Wheat.* 471; reversing 2 *Cranch C. Ct.* 319.

14. Demand—Time.—Where a note is payable in instalments due at different times, and demand on the maker is not made till the last instalment falls due, and then demand is made for the whole amount, the demand is good for the purpose of charging the indorser for the last instalment. *Eastman v. Turman* 24 *Cal.* 379.

15. Indorsement.—If a person who is not a party to a promissory note indorse his name upon it in blank, with intent to give it credit, the holder may write over it an engagement to pay it on demand, waiving notice of non-payment. (*Offut v. Hall*, 1 *Cranch*, 504.) A *parol agreement* between two indorsers at the time of indorsement, to divide the loss between them in the event of non-payment, is a collateral agreement, founded on sufficient consideration, and will support an action. (3 *Pet.* 477; 1 *Hamm.* 413; 2 *Bos. & P.* 270; *Phillips*

v. Preston, 5 *How. U.S.* 278.) Payment of a note by an indorser after protest, is a good consideration for an *assumpsit* on the part of the maker, for the note, with cost of protest. *Morgan v. Rientzel* 7 *Cranch*, 273.

16. Execution.—The general rule of law requiring proof of the title of the holders of a note, may be modified by a rule of court dispensing with proof of the execution of the note, unless the party shall annex to his plea an affidavit that the note was not executed by him. *Mills v. Bank, of United States*, 11 *Wheat.* 431.

17. Foreign Coin Note.—Where a note is payable in foreign coin, the value of such coin must be averred. (*United States v. Hardyman*, 13 *Pet.* 176.) For pleading note in a foreign language, see Note 12, p. 540.

18. Forms of Notes.—A written promise to pay to "A. B.," without adding "or order" or "or bearer," is a promissory note within the statute. (*Burchell v. Slocock*, 2 *Ld. Raym.* 1,545; *Smith v. Kendall*, 6 *T. R.* 123; *Downing v. Blackenstone*, 3 *Cai.* 137; *Goshen and Minisink Turnpike Co. v. Hurin*, 9 *Johns.* 217.) An instrument in the following form: "Troy, August 4th, 1846. I hereby agree to pay Miss A. Y. twenty dollars per month during her natural life, for her attention to my son J. S. M. (*Signed*) B. M."—is not a promissory note. (*Spear v. Downing*, 12 *Abb. Pr.* 437.) Such an instrument expresses no consideration, since it affords no presumption that the services referred to were rendered in pursuance of a previous request of the promisor, or that they were beneficial to him. (*Id.*) On a promise to pay "as soon as able," a judgment and execution are the best test of defendant's ability to pay. *Cecil v. Welch*, 2 *Bush (Ky.)* 168.

19. Indebtedness.—The statute makes a promissory note *prima facie* evidence of indebtedness, though no consideration be expressed. (*Stewart v. Street*, 10 *Cal.* 372.) And it is not necessary to add an averment that the defendant is indebted. *Connecticut Bank v. Smith*, 9 *Abb. Pr.* 168.

20. Interest.—If the holder of a promissory note fill in the rate of interest left blank by the maker, he can collect only legal interest; but an innocent holder from him may collect the interest as filled in. (*Fisher v. Dennis*, 6 *Cal.* 577.) Interest need not be averred. It can be recovered as damages. (*Chinn v. Hamilton*, *Hempst.* 438.) The

filling of a blank with the rate of interest, does not thereby vitiate the note. (*Fisher v. Dennis*, 6 *Cal.* 577; *Visher v. Webster*, 8 *Cal.* 109; see *Humphreys v. Crane*, 5 *Cal.* 173.) If the original note offered in evidence contains an abbreviation for the word "administratrix," and specifies the rate of interest in figures only, and the copy in the complaint gives the word in full and states the rate of interest in words as well as figures, the variance is immaterial. *Corcoran v. Doll*, 32 *Cal.* 82.

21. Legal Effect.—A note may be set out according to its legal effect. (*Drake v. Fisher*, 2 *McLean*, 69; *Spaulding v. Evans*, *Id.* 139; compare *Turner v. White*, 4 *Cranch C. Ct.* 465.) The difference between a note payable on or before such a day, is material when described according to its legal effect. (*Kikindal v. Mitchell*, 2 *McLean*, 402.) A complaint pleading a note according to its legal effect must state a payee, otherwise it seems it is demurrable. *White v. Joy*, 13 *N.F.* 83; see Note 19, p. 541.

22. Liability of Maker.—The maker is bound by the contract which he signs, whatever his motive or purpose in signing it may be, and cannot vary the legal effect of his obligation by parol. (*Aud v. Magruder*, 10 *Cal.* 282.) A promissory note is neither an account, unliquidated demand, nor a thing in action not arising out of contract. *Priest v. Bounds*, 25 *Cal.* 188.

23. Lost Paper.—In case of the loss or destruction of negotiable paper, as a note or certificate of deposit, the plaintiff cannot maintain an action without first indemnifying the maker against all future claims upon it. (*Welton v. Adams*, 4 *Cal.* 37; *Price v. Dunlap*, 5 *Cal.* 483.) And no distinction exists between a note destroyed and one lost. *Randolph v. Harris*, 28 *Cal.* 561; consult Note 20, p. 541.

24. Maturity.—It is not necessary to show that the note was due before the commencement of the action. (*Smith v. Holmes*, 19 *N.F.* 271; *Maynard v. Talcott*, 11 *Barb.* 569.) Nor that the time for payment has elapsed. (*Peets v. Bratt*, 6 *Barb.* 662; *Maynard v. Talcott*, 11 *Id.* 569; *Smith v. Holmes*, 19 *N.F.* 271; *Keteltas v. Myers*, *Id.* 231.) An allegation that a note was given to provide for payment: *Held*, not to mean a present payment, but a provision for a future payment. *Bates v. Rosenkrans*, 23 *How. Pr.* 98.

25. New Promise.—In suits upon written instruments for the

payment of money, if it appear from the complaint that the demand is barred, and plaintiff relies upon a new promise, renewing or continuing the contract, such new promise must be alleged. (*Smith v. Richmond*, 19 Cal. 476.) And such a complaint upon a promissory note contains a cause of action, if it alleges that the defendant has, some time within four years of the day the suit was commenced, "in writing, acknowledged and promised to pay the note." Such allegation imports that the defendant signed his name to the writing. *Porter v. Elam*, 25 Cal. 292.

26. New Promise, Allegation of.—Complaint avers in substance that defendant made his note, etc., setting out a copy, that plaintiff is holder by transfer from the payee, etc., and that defendant is indebted to plaintiff therein in the sum, etc. The complaint then avers: "Plaintiff further shows that after said note was executed, etc., * * * defendant by virtue of * * * proceedings in insolvency, etc., * * * claims to have been discharged from the payment of the note and debt hereinbefore mentioned; and plaintiff further shows that after said discharge aforesaid, on or about * * * defendant promised" the payee and other persons that he would pay said note to said payee on demand, etc.; and that defendant thereby revived said obligation, etc. *Held*, that the complaint does not set up two causes of action; that the gravamen of the action was designed to be the promise, the previous indebtedness being averred as matter of inducement. (*Smith v. Richmond*, 15 Cal. 501.) For allegation of *new promise*, and rules of pleading thereon, see p. 401, Note 43, *et seq.*

27. Non-Payment.—In a complaint upon a promissory note, an allegation of its non-payment is material, and, if omitted, the complaint is demurrable. The averment that there is a certain amount due upon the note is insufficient, being a statement of a mere conclusion of law. (*Frisch v. Caler*, 21 Cal. 71.) An allegation in the complaint that no "part of said note, principal or interest, has been paid," is a sufficient averment of a breach. *Jones v. Frost*, 28 Cal. 245.

23. Oregon.—For the sufficiency of a complaint against the maker of a note under the practice in Oregon, see *Moss v. Cully*, 1 Or. 147; *Williams v. Kneighton*, *Id.* 234.

29. Ownership.—The averment in the complaint that plaintiff is the owner of the note and mortgage in suit, is a sufficient answer to a demurrer, on the ground that it does not appear by the complaint that the plaintiff is the holder of the note. (*Rollins v. Forbes*, 10 Cal. 300.)

That defendant made his promissory note in writing, and thereby "promised to pay plaintiff," is sufficient to show that plaintiff is owner of the note. (*Moss v. Cully*, 1 *Oregon*, 147.) The averment that the plaintiff was the owner of the note is not the averment of an issuable fact. It is the allegation of a legal conclusion, and is immaterial, and should be omitted. (*Poorman v. Mills*, 35 *Cal.* 118; approving *Wedderspoon v. Rogers*, 32 *Cal.* 569; see, also, 1 *Code R.* 119; 2 *Id.* 80; 1 *Duer*, 265; 2 *Id.* 650; 3 *Id.* 691; 4 *Id.* 362; 8 *Id.* 385; 9 *Id.* 9; 9 *How. Pr.* 216; 11 *Id.* 217; 12 *Id.* 460; 15 *Id.* 266; 17 *Id.* 487; 22 *Id.* 23; 6 *Barb.* 662; 11 *Barb.* 620; 17 *Barb.* 530; 19 *N.Y.* 231; 24 *N.Y.* 547; 7 *Abb. Pr.* 447; 9 *Abb. Pr.* 118; 13 *Id.* 249; 12 *How. U.S.* 313; 2 *Sandf.* 673; 1 *Handy*, 31.) For the plaintiff may recover without being the holder, as where the note has been destroyed or lost. (*Supervisors v. White*, 30 *Barb.* 70; *Desmond v. Rice*, 1 *Hill.* 530; *Des Artes v. Leggett*, 16 *N.Y.* 582;) or as, when the note is in possession of defendant. (*Smith v. McClure*, 5 *East.* 476; *Selden v. Pringle*, 17 *Barb.* 468.) In such cases he may sue if he is the real party in interest, trustee of an express trust, or person authorized by statute. *Root v. Price*, 22 *How. Pr.* 372; *Butterfield v. Macomber*, *Id.* 150; see on this subject, "*Pleadings*," p. 129, Notes 24, 35, 43, 44.

30. Place.—Omission to state the place where a note is payable is a fatal defect. (*Lebree v. Dorr*, 9 *Wheat.* 558; *Covington v. Comstock*, 14 *Pet.* 43.)

31. Presentment.—In an action against the maker of a note, or the acceptor of a bill of exchange, in which the place of payment is fixed, it is not necessary to aver presentment at that place and refusal to pay. (*Montgomery v. Tutt*, 11 *Cal.* 307.) But the averment of presentment and demand of note at the place specified, is necessary to charge an indorser. (*Gay v. Paine*, 5 *How. Pr.* 108; *Ferner v. Williams*, 14 *Abb. Pr.* 215; *Wolcott v. Van Santford*, 17 *Johns.* 248; *Caldwell v. Cassidy*, 8 *Cow.* 271; 3 *Wend.* 1; 17 *Mass.* 389; 13 *Pet.* 36; 11 *Wheat.* 171; 5 *Den.* 329; 19 *Johns.* 419.)

32. Real Party in Interest.—If the holder of a promissory note legally has its possession and is entitled to receive its payment, he is the proper plaintiff in its prosecution, and this without reference to the party who may ultimately be entitled to a participation in its proceeds. *Williams v. Brown*, 2 *Keyes*, 486; consult "*Parties*," p. 92.

33. Promise.—Where the words import a promise unconditional,

the law affixes its obvious signification. *Aud v. Magruder*, 10 *Cal.* 282.

34. Rate of Interest.—On a note made in another state, and bearing higher interest than is lawful by the law of the forum, the foreign statute need not be pleaded, for the court may presume that the common law, by which any rate of interest is lawful, prevails in the law of the place of the contract. *Buckinghouse v. Gregg*, 19 *Ind. (Kerr.)* 401.

35. Stamp not Necessary.—The point that the complaint fails to show a cause of action, because the copy of the note sued upon and therein contained is without a copy of any internal revenue stamp, is not tenable. (*Hallock v. Jaudin*, 34 *Cal.* 167.) The maker of a promissory note through whose fault an insufficient stamp was affixed, cannot object to its being received in evidence. (*Jacquin v. Warren*, 40 *Ill.* 459.) That a note was not stamped until after it was issued, is not a defense, as against a *bona fide* holder for value. (*Blackwell v. Denis*, 23 *Iowa*, 63.) One who has received a promissory note, from which a stamp was accidentally omitted, may recover for the goods sold therefor, if he cannot for the note. (*Wilson v. Carey*, 40 *Vt.* 179.) Even if the want of a stamp render a note inadmissible in evidence under a special count, yet under the common counts in *assumpsit*, the note is admissible to explain testimony of a settlement made between the parties at the date of the note, and that an amount was found due equal to that for which the note was given. (*Israel v. Redding*, 40 *Ill.* 362; *Jacquin v. Warren*, *Id.* 459.) The omission to stamp a note must have been with intent to evade the Act of March 3d, 1865, to make the note invalid under that act. *Dudley v. Wells*, 55 *Me.* 145.

36. Substitute Notes.—A complaint is not deficient in stating a cause of action, because after alleging valid notes, it states that they were given up and canceled, on the giving by defendant of new notes, in which usurious interest was reserved for the extension of time. The plaintiff may in such a case recover upon the original notes. *Winsted Bank v. Weeb*, 39 *N.Y.* 325.

37. Value Received.—The legal effect of a promissory note is the same, with or without the words "value received." *People v. McDermott*, 8 *Cal.* 288.

33. Void Notes.—Notes given for a gaming consideration are

valid in the hands of a *bona fide* indorsee. (*Haight v. Joyce*, 2 *Cal.* 64.) A negotiable note, the consideration of which is against public policy, becomes valid in the hands of an innocent holder before maturity. (*Thorne v. Yontz*, 4 *Cal.* 321.) A promissory note, given for the release of property seized for a toll imposed by the state law on lumber floated down a stream from that state into another, is void for want of consideration. (*C. L. R.R. Co. v. Patterson*, 33 *Cal.* 334.) Where T. made a promissory note to Mrs. W., which was not stamped, and after her death, at the request of her administrator, T. affixed a stamp: *Held*, that the note was invalid, for want of a stamp, in the hands of Mrs. W.; that it could not be re-delivered after her death as a new note, for want of a payee; and the omitted stamps could be affixed so as to validate it as an old note only by a revenue stamp affixed in accordance with the Act of Congress of March 3d, 1865. *Wayman v. Torreyson*, 4 *Nev. Rep.* 124.

39. When Due.—When days of grace are allowed, the day on which the note became due is excluded from the computation. (*Story on Prom. Notes*, § 217; *Chitt. on Bills*, 403; *Bayley on Bills*, 245.) And the maker has all of the last day on which his note falls due, to pay it, and suit commenced thereon on that day is premature. (*Wilcombe v. Dodge*, 3 *Cal.* 260; see *Davis v. Eppinger*, 18 *Cal.* 381; *Bell v. Sackett*, *Cal. Sup. Ct., Oct. T.*, 1869.) A promissory note payable generally, without specifying any time, is due immediately. *Holmes v. West*, 17 *Cal.* 623; *Keyes v. Fenstermaker*, 24 *Id.* 329; see *Ante*, “*Bills of Exchange*,” Note 60.

No. 228.

ii. *The Same—On Two Notes, One being Partly Paid.*

[TITLE.]

The plaintiff complains, and alleges:

First.—For a first cause of action:

I. That on the day of, 187., at, the defendant, by his promissory note, promised to pay to the plaintiff dollars, [days] after date [or on demand], [or set out copy of note].

II. That he has not paid the same [except dollars, paid on the day of, 187.].

Second.—For a second cause of action:

I. That on the day of, 187., at, the defendant, by his other promissory note, promised to pay to the plaintiff dollars, [days] after date [*or* on demand], [*or set out copy of note*].

II. That he has not paid the same.

Wherefore the plaintiff demands judgment against the defendant for the sum of [*aggregate principal*], with interest on dollars thereof from the day of, and with interest on thereof from the day of, and costs of suit.

40. Causes of Action.—It would seem that several notes are several causes of action, and must be separately stated. (*Van Namee v. People*, 9 *How. Pr.* 198; *Dorman v. Kellam*, 4 *Abb. Pr.* 202.) But it appears the contrary is held in Iowa. *Merritt v. Nihart*, 11 *Iowa*, 57.

41. How Alleged.—If preferred, and in fact it is the better practice, a copy of the notes may be set out, as in Form No. 189, in pleading on written instruments.

No. 229.

iii. *On Several Notes given as Security.*

[TITLE.]

The plaintiff complains, and alleges:

I. That upon the day of, 187., the defendants were indebted to the plaintiffs in the sum of dollars.

II. That to secure the payment of that sum, the defendants made their promissory notes copies of which are hereto annexed, marked Exhibits "A," "B," and "C."

III. That at the same time the defendants agreed with the plaintiffs, in writing, that in case of default in the payment of any of the said notes at any time when the same should become due and payable, the whole amount of the said sum of dollars, and interest, then remaining unpaid, should forthwith, at the option of the plaintiffs, become at once due and payable.

IV. That the first of said notes became due and payable on the day of, 187..

V. That defendants have not paid the same.

[*Demand of Judgment.*]

[*Annex Copies of Notes, marked Exhibits "A," "B," and "C."*]

42. Made their Promissory Notes.—It is not necessary to allege, "agreed to deliver, and did make and deliver to the plaintiffs," because the copies are annexed showing possession in the plaintiff of the said notes, and because "made" implies delivery. See *Ante*, Note 11 under Form No. 227; see *Brown v. Southern Mich. R.R. Co.*, 6 *Abb. Pr.* 237.

No. 230.

iv. *On a Note Signed by an Agent.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187.., at, the defendant, by his agent [*or* attorney in fact], duly authorized thereto, made his promissory note, and thereby promised to pay to the plaintiff [*or*

his order] dollars, months after said date.

II. That he has not paid the same [except dollars paid on the . . . day of, 187.].

[*Demand of Judgment.*]

43. Agent.—A complaint averring that the principal, by his agent, made a promissory note, is good. (*Childress v. Emory*, 8 *Wheat*. 642; *Sherman v. Comstock*, 2 *McLean*, 19; compare *Wilson v. Porter*, 2 *Cranch C. Ct.* 458.) But it has been held, that in the common counts it is not necessary to state that the defendants acted by an agent, but that an averment that the act was the act of the defendants would be supported by proof of the act of their agent. *Sherman v. N.Y. Central R.R. Co.*, 22 *Barb.* 239.

44. "Duly Authorized."—Where the pleading shows, by setting out a copy of the instrument, that the act was by an agent, his authority should be averred. *McCullough v. Moss*, 5 *Den.* 567.

45. Ratification of Principals.—The ratification by a principal, of an unauthorized act of an agent, has a retroactive efficacy, and being equivalent to an original authority, an allegation of due authority is sustained by proof of such ratification. *Hoyt v. Thompson*, 19 *N.Y.* 207.

No. 231.

v. *On a Note made by Partners.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendants, under their firm name of A. B. & Co., made their promissory note, whereby they promised to pay to the plaintiff dollars, [days] after date.

II. That they have not paid the same.

[*Demand of Judgment.*]

46. How Alleged.—Signature of a note, in the name of a firm, by a partner, may be alleged as made by the firm. It is sufficient to set forth a writing according to its legal effect. *Manhattan Co. v. Ledyard*, 1 *Cai.* 192; *Vallett v. Parker*, 6 *Wend.* 615; see *Bass v. Clive*, 4 *Campb.* 78.

47. Joint Makers.—All the joint makers of a promissory note are principals. (*Shriver v. Lovejoy*, 32 *Cal.* 574.) And suit must be brought against all. *Woodworth v. Spafford*, 2 *McLean*, 168.

No. 232.

vi. Another Form, Averring Partnership.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of making the note hereafter mentioned, the defendants were partners, doing business at, under the firm name of A. B. & Co.

II. That on the day of, 187., at, the defendants, under their said firm name, made their promissory note, and thereby promised to pay the plaintiff dollars, months after said date.

III. That they have not paid the same.

[*Demand of Judgment.*]

48. Allegation by Payee as Receiver against Partners.—That heretofore the defendants, under their firm name of A. B. & Co., made their promissory note, and thereby promised to pay to the plaintiff, as such receiver [*or to his order*], dollars, on the day of, 187.. See *White v. Joy*, 13 *N.Y.* 83.

49. As such Receiver.—The act should be averred as that of the party as such receiver. (*Merritt v. Seaman*, 6 *N.Y.* 168; and cases

there cited.) This clause was contained in the complaint in (*Smith v. Levinus*, 8 *N.F.* 472; and see *Gould v. Glass*, 19 *Barb.* 179; *Sheldon v. Hoy*, 11 *How. Pr.* 11.) Where, however, the plaintiff's character is once sufficiently stated, the word "plaintiff" in subsequent parts of the pleading requires no addition to the description.

50. Partnership.—An averment that the note was indorsed by the defendants, under a certain name and description, is sufficient. (*Kendall v. Freeman*, 2 *McLean*, 189; *Davis v. Abbott*, *Id.* 29.) Where the fact of partnership is likely to be drawn in question, it is better to aver the fact distinctly. (*Oechs v. Cook*, 3 *Duer*, 161.) The averment of co-partnership is immaterial, unless the defendant denies the execution of the note. *Whitwell v. Thomas*, 9 *Cal.* 499.

51. Said Firm.—Where a partnership between the makers is averred, it would be sufficient to state that the said firm made the note. *Manhattan Co. v. Ledyard*, 1 *Cai.* 192.

52. Sight Note, Allegation of.—That on the day of, 187., at, said note was duly presented to the defendant [*maker*], with notice that payment was required according to the terms thereof. *Sight* is a condition precedent. 2 *Chitt. Pl.* 234.

No. 233.

vii. *On a Note Wrongly Dated.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the defendant made his promissory note, bearing date, by mistake, on the day of, 187., whereas, in truth, it was intended to bear date on said day of, 187., and thereby promised to pay the plaintiff [*or to his order*], dollars, days after said [*true date*].

II. That he has not paid the same.

[Demand of Judgment.]

No. 234.

viii. *Domestic Corporation, Payee, against a Foreign Corporation.*

[TITLE.]

The plaintiff complains, and alleges:

I. [*Allege incorporation of plaintiff under the Act, as in Form No. 43.*]

II. That the defendant is a corporation, chartered by and under the laws of the State of Nevada, and pursuant to an act of the Legislature of said State, [*title of act*], passed [*date of enactment*].

III. That on the day of, 187., at, the defendant, as such corporation, by one A. B. its agent [*or attorney in fact*], made its promissory note, and thereby promised to pay to the plaintiff, under its corporate name of E. F. [*or to their order*], dollars, months after said date.

IV. That the same has not been paid.

[*Demand of Judgment.*]

53. Form of Note.—"The President, by the order of the Board, of the A. B. Co., promise to pay," etc., signed, "C. D. Pres., E. F.," *et al.*, binds the individuals signing, and not the corporation. (*Caphart v. Dodd*, 3 *Bush*, 584.) "The President and Directors of the A. B. Co. will pay," etc., signed, "C. D. Pres., E. F.," *et al.*, does not bind the individuals signing, but only the corporation. *Yowell v. Dodd*, 3 *Bush*, 581.

54. Insurance Company.—In an action by the indorsees against the maker of a note, of which an insurance company were the payees and indorsers, the complaint showed that the defendant made his note to the Atlas Mutual Insurance Company, or order; and that the Company indorsed it, and transferred and delivered it to the

plaintiffs. It did not expressly aver that the transfer was made pursuant to a resolution of the Board of Directors. *Held* sufficient on demurrer. If such resolution were necessary, it was implied and provable under the allegation that the Company transferred the note. But that is not true if the transfer was not made by the proper officer, and according to law. *Nelson v. Eaton*, 15 *How. Pr.* 305.

55. Power of Corporation to Make Note.—In the absence of any prohibitory statute, a corporation may give a note for a debt contracted in the course of its legitimate business. (*Mott v. Hicks*, 1 *Cow.* 513; and page 532; *Moss v. Oakley*, 2 *Hill*, 265; *Attorney-General v. Life and Fire Ins. Co.*, 9 *Paige*, 470; *Kelly v. Mayor etc. of Brooklyn*, 4 *Hill*, 263; *McCullough v. Moss*, 5 *Den.* 567.) *Prima facie*, a corporation has power to take a promissory note. *Mutual Benefit Life Ins. Co. v. Davis*, 12 *N.Y.* 569.

56. Presumption of its Legality.—Where there is nothing on the face of the note to show that it was issued contrary to law, or that the consideration or the purpose was illegal, the presumption is that it was given for a lawful purpose. *Safford v. Wyckoff*, 4 *Hill*, 442; *Baker v. Mechanics' Fire Ins. Co.*, 3 *Wend.* 94.

57. Sufficient Allegation.—See *N.Y. Floating Derrick Co. v. N.J. Oil Co.*, 3 *Duer*, 648.

No. 235.

ix. Payee against Surviving Maker.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of the making the note hereafter mentioned, the defendant and one A. B. were partners, doing business under the firm name of A. B. & Co.

II. That on the day of, 187., at, they made, under their said firm name, their promissory note, and thereby promised to pay to the plaintiff [or his order], dollars, months after said date.

III. That they have not paid the same.

IV. That on the day of, 187., at, said A. B. died, leaving the defendant the sole surviving partner of said firm.

[*Demand of Judgment.*]

53. Joint Actions.—A joint action at law cannot be maintained against survivor and administrator of deceased maker of a promissory note. (*Maples v. Giller*, 1 *Nev.* 233.) The rule in equity has been that the estate of a deceased joint obligor could only be reached when survivor was bankrupt or insolvent. (*Id.*) Persons jointly liable must all be made defendants, and a joint judgment rendered against all. *Keller v. Blasdel*, 1 *Nev.* 491.

59. Non-Payment.—Where an action is brought against two, as the survivors of one, who executed a joint note, it is not essential to allege in the declaration that the note was not paid by the deceased. *Silver v. Henderson*, 3 *McLean*, 165; but see *Winter v. Simonton*, 3 *Cranch C. Ct.* 62.

No. 236.

x. *Payee against Maker and Indorser, on Note Taken on the Faith of the Indorsement.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant A. B. made his promissory note, and thereby promised to pay to the order of the plaintiff, at, the sum of dollars, months after said date.

II. That the defendant C. D. indorsed said note, when said A. B. delivered the same to the plaintiff.

III. That said note at maturity was presented for

payment, but was not paid; of all which due notice was given to the defendant C. D.

IV. That said note was made by the defendant A. B., and indorsed by the defendant C. D., for the purpose of paying for [*state what*], on the credit of such indorsement; that the defendant C. D. indorsed the same for the purpose of procuring for the said maker a credit with the plaintiff, knowing that it would be so applied, and that said note was so passed and so indorsed by the defendant with his privity, to the plaintiff, in payment for [*state what*].

V. That no part thereof has been paid.

[*Demand of Judgment.*]

60. Form.—See, as to the authorities sustaining a form similar to this, (*Moore v. Cross*, 19 *N.F.* 227; and *Bradford v. Martin*, 3 *Sandf.* 647; *Murphy v. Merchant*, 14 *How. Pr.* 189.) For a complaint on instrument for payment of money only: *Held* sufficient against makers, and insufficient against indorsers. See *Conkling v. Gandall*, 1 *Keves*, 228.

No. 237.

i. *First Indorsee against Maker.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, by his promissory note, promised to pay to the order of one C. D., dollars

II. That the said C. D. indorsed the same to the plaintiff.

III. That defendant has not paid the same.

[*Demand of Judgment.*]

61. Certificate of Deposit.—*Assumpsit* by an indorsee, on a certificate of deposit by A., payable to the order of himself, on the presentation of this certificate properly indorsed. If no presentation or demand were alleged in the complaint, it is bad on general demurrer. Such certificate is a negotiable instrument. *Bellows Falls Bank v. Rutland County Bank*, 40 *Vt.* 377.

62. Consideration.—When the consideration passing between the indorsee and his indorser is not equal to the amount of the paper, the indorsee can recover only the amount of consideration he has paid. (*Coye v. Palmer*, 16 *Cal.* 158.) The indorsement, as well as the making of a note, imports a consideration. (*Hughes v. Wheeler*, 8 *Cow.* 77; *Cruger v. Armstrong*, 3 *Johns. Cas.* 5; *Conroy v. Warren*, *Id.* 259; *Safford v. Wyckoff*, 4 *Hill*, 442; *Nelson v. Cowing*, 6 *Id.* 336; *Wheeler v. Guild*, 20 *Pick.* 550; *Collins v. Martin*, 1 *Bos. & P.* 648; *Ogden v. Saunders*, 12 *Wheat.* 213.) The phrase, in a declaration on a note, that the plaintiff received it “before maturity, *bona fide*, and in due course of trade,” means that he took it for value. *Miller v. Mayfield*, 37 *Miss.* 688.

63. Date.—The date of the note need not be stated. (*Coxon v. Lyon*, 2 *Camp.* 307; *Smith v. Lord*, 2 *Dowl. & L.* 761.) A variance would be immaterial. (*Bentzing v. Scott*, 4 *Carr. & P.* 24.) The plaintiff may transfer the allegation of time and place into one of date thus: That the defendant, by his promissory note, dated on, at, promised, etc.

64. Delivery.—An averment of indorsement imports delivery. *Bank of Lowville v. Edwards*, 11 *How. Pr.* 226; *Appleby v. Elkins*, 2 *Sandf.* 673; *N.Y. Marbled Iron Works v. Smith*, 4 *Duer*, 362; *Griswold v. Loverty*, 3 *Id.* 690; *Burrall v. DeGroot*, 5 *Duer*, 379; *Marston v. Allen*, 8 *Mees. & W.* 494; *Purdy v. Vermilyea*, 8 *N.Y.* 346.

65. Indorsement by a Firm.—An indorsement or signature of a note, in the name of a firm, by a partner, may be alleged as made by the firm. It is sufficient to set forth a writing according to its legal effect. (*Manhattan Co. v. Ledyard*, 1 *Cal.* 192; *S.C., Col. & C. Cas.* 226; *Vallett v. Parker*, 6 *Wend.* 615; *Bass v. Clive*, 4 *Camp.* 78.) So, also, of joint makers not alleged to be partners. (*Mack v. Spencer*, 4 *Wend.* 411.) It is sufficient in such cases to allege, generally, that M. N. & Co. indorsed it. *Cochrane v. Scott*, 3 *Wend.* 229; *Bacon v. Cook*, 1 *Sandf.* 77.

66. Owner.—The holder of negotiable paper indorsed before maturity, is supposed to be the *bona fide* owner of the same, and all intendments are in his favor. (*Palmer v. Goodwin*, 5 *Cal.* 458.) Nor is it necessary that he should show how he became possessed of the note. (*Id.*) His right to maintain the action cannot be questioned. (*Price v. Dunlap*, 5 *Cal.* 483.) So, it has been decided that the possession obtained before or after maturity, is *prima facie* evidence of ownership. (*McCann v. Lewis*, 9 *Cal.* 246.) It is no objection to a recovery that title be shown out of the payee by special indorsements, without any re-transfer from the last indorsee. (*Naglee v. Lyman*, 14 *Cal.* 450.) An allegation that the plaintiff (indorsee) is owner, or owner and holder, is unnecessary. (See *Ante*, Note 28.) Since, when title is shown, a denial that he is the lawful owner and holder, is frivolous. *Catlin v. Gunter*, 1 *Duer*, 253; *Fleury v. Roget*, 5 *Sandf.* 646.

No. 238.

ii. *The Same, against First Indorser.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to the plaintiff a promissory note, made [*or* purporting to have been made] by one A. B., on the day of, 187., at, to the order of the defendant, for the sum of dollars.

II. That on the day of, 187., the same was presented to the said A. B. for payment, but was not paid [*or state facts excusing want of presentment*].

III. That notice thereof was given to the defendant.

IV. That he has not paid the same.

[*Demand of Judgment.*]

67. Accommodation Indorsement.—A promissory note was indorsed by a third person before delivery to the payee. *Held*, that such indorsement was, *prima facie*, an accommodation to the payee; but proof that his design was to become a surety or guarantor would make him liable to the payee. (*Clarke v. Smith*, 2 *Cal.* 605.) Where a promissory note made payable to S., and previous to its delivery to payee was indorsed for the accommodation of the maker by H. and brother, and defendant, upon agreement that each would become surety if the other would, they were guarantors jointly and not severally liable. (*Brady v. Reynolds*, 13 *Cal.* 31.) To create a several liability, express words are necessary. *Id.*

68. Demand, how Made.—Payment of the note must be first properly demanded of the makers, and due notice given to the indorser, before any legal liability attaches to the latter; and it is incumbent upon the pleader to state these facts. (*Conkling v. Gandall*, 1 *Keyes*, 228.) That as against the *indorser*, an averment of demand at the place designated is deemed necessary, *Bank of United States v. Smith*, 11 *Wheat.* 171.

69. Demand, when Made.—Where, by the local law, the payment of a note is demanded on the fourth day of grace, to charge the indorser the complaint must by the demand on the fourth, and not on the third day. (*Renner v. Bank of Columbia*, 9 *Wheat.* 581; Compare *Coyle v. Gozslar*, 2 *Cranch. C. C.* 625.) If there are stated business hours at the place where it is made payable, presentment and demand must be made within those hours. *McFarland v. Pico*, 8 *Cal.* 626.

70. Demand, Effect of Failure of.—The failure to make presentment and demand would not discharge the debt, but would only affect the question of costs and damages. *Montgomery v. Tutt*, 11 *Cal.* 307.

71. Demand, how Alleged.—In an action against the indorser of a bill or note, an allegation of a demand in general terms, "although often requested," etc., is good, at least after verdict. (*Leffingwell v. White*, 1 *Johns. Cas.* 99.) But if the note was made payable at a particular place, an allegation as in preceding forms will be sufficiently specific averment of demand and notice. *Taylor v. Snyder*, 3 *Den.* 145.

72. Demand and Notice.—The contract of the indorser of

promissory note is a written one, and his liability a conditional one, to pay upon a proper demand and notice. (*Goldman v. Davis*, 23 *Cal.* 256.) Upon a demand made within a reasonable time, and that in the event of his failure to do so, the indorser will pay. (*Keyes v. Fenstermaker*, 24 *Cal.* 329.) And the contract cannot be changed from a conditional to an absolute contract by parol evidence. *Goldman v. Davis*, 23 *Cal.* 256.

73. Demand and Notice, Allegation of Excuse for Omission of.—An express waiver of notice of non-payment, is sufficient excuse of demand and notice of non-payment. (*Matthey v. Galley*, 4 *Cal.* 62; *Minturn v. Fisher*, 7 *Id.* 573.) And this may be done by an agent of the indorser, and a verbal waiver of demand, or of demand and notice, may be proved. (See *Mills v. Beard*, 19 *Cal.* 158; see, also, *Drinkwater v. Tebbetts*, 17 *Me.* 16;) where notice was waived in writing. But the declaration of the indorser, made to a third person, "that notice not having been given at the proper time would make no difference to him, and that he would do what was right," is not a waiver. (*Olendorff v. Swartz*, 5 *Cal.* 480.) Where payment by the maker to the indorser is relied upon as an excuse, it must be payment directly and specifically for the note, not as security for transactions in the aggregate. (*Van Norden v. Buckley*, 5 *Cal.* 283.) If the waiver was before maturity, it operates as an estoppel to the indorser from denying that demand was made and notice given, and evidence of such waiver is admissible under the averment of demand and notice. *Holmes v. Holmes*, 9 *N.F.* 525; *Coddington v. Davis*, 1 *N.F.* 186.

74. Grace.—Three days, commonly called days of grace, shall be allowed, except on sight bills or drafts. (*Stat.* 1851, p. 523.) In this, the distinction between a promissory note and a bill or draft is obvious. (*Bell v. Sackett*, *Cal. Sup. Ct., Oct. T.*, 1869.) So, a note payable one day after date cannot be sued on the day after its execution. (*Davis v. Eppinger*, 18 *Cal.* 378.) A partner may waive grace upon a firm note made by him, and an action may be brought upon it the next day after its execution. (*Pierce v. Jackson*, 21 *Cal.* 636.) For the purpose of fixing the liability of an indorser, the note is payable on demand at any time during reasonable hours on the last day of grace, but the maker has the whole of the last day, and therefore action cannot be commenced till the following day. *McFarland v. Pico*, 8 *Cal.* 626; *Bell v. Sackett*, *Cal. Sup. Ct., Oct. T.*, 1869.

75. Indorsement, Averment of.—An averment in the decla-

ration, that the note was indorsed by the defendants under a certain name and description, is sufficient. Where a contract shows a joint liability, it is unnecessary to allege a partnership. (*Kendall v. Freeman*, 2 *McLean*, 189; *Davis v. Abbott*, *Id.* 29.) The fact of the indorsement only need be pleaded to show title in the plaintiff, and an averment that the plaintiff is the owner and holder is a conclusion of law, and need not be pleaded. (*Poorman v. Mills*, 35 *Cal.* 118.) Where an indorsement upon a promissory note was made, not by the payee, but by persons who did not appear to be otherwise connected with the note, and the note thus indorsed was handed to the payee before maturity, a motion to strike out of the declaration a recital of these facts, and also an allegation that this indorsement was thus made for the purpose of guarantying the note, was properly overruled. *Rey v. Simpson*, 22 *How. U.S.* 341.

76. Indorsement, Effect of.—The presumption is that the indorser of a promissory note is the holder thereof for value. (*Poorman v. Mills*, 35 *Cal.* 118.) Where a promissory note is indorsed in blank, the title and right of action pass by delivery, and the note is payable to the bearer. (*Poorman v. Mills*, 35 *Cal.* 118.) An unlawful diversion is not to be presumed, but negotiation to a *bona fide* holder may be presumed, where the paper bears the blank indorsement of the defendant. (*Rice v. Isham*, 1 *Keyes*, 44.) An agent who has received a promissory note by indorsement, holds the title as against all persons thereto, except the principal, and may maintain an action thereon in his own name. *Poorman v. Mills*, 35 *Cal.* 118.

77. Indorsement by Corporation.—In action against corporation as indorsers, it need not be averred that the note was indorsed by the defendants *in the course of their legitimate business*. *Andrews v. Astor Bank*, 2 *Duer*, 629; *Price v. McClave*, 6 *Id.* 544; and 3 *Abb. Pr.* 253; *Mechanics' Banking Association v. Spring Valley Shot and Lead Co.*, 25 *Barb.* 419; *Nelson v. Eaton*, 15 *How. Pr.* 305.

78. Notice to Charge Indorser.—Notice of demand, as well as of non-payment, should be alleged. (*Pahquioque Bank v. Martin*, 11 *Abb. Pr.* 291.) A general averment of notice, as above, is sufficient. (*Boot v. Franklin*, 3 *Johns.* 207.) Where a note is due on the first of July, the fourth being a non-judicial day, notice of protest on the third is premature, and will not charge the indorser. (*Toothaker v. Cornwall*, 3 *Cal.* 144.) If much time intervenes between demand and notice, in transfers after maturity, the question may arise whether the

delay has not released the indorser. (*Thompson v. Williams*, 14 *Cal.* 160.) When demand of payment is made upon the maker, notice of demand and non-payment must be given to the indorser within the same time which is required in the case of a bill made payable at a particular day. (*Keyes v. Fenstermaker*, 24 *Cal.* 329.) And it should be made on the day following the demand, unless good reason exists for not doing so. (*Id.*) An indorser who signs his name under the words, "holden on the within note," is entitled to notice of demand and non-payment. *Vance v. Collins*, 6 *Cal.* 435.

79. Notice, how Given.—Notice should be personally served, if indorser resides in the same city, and in such case service through the Post Office is not sufficient. (*Vance v. Collins*, 6 *Cal.* 435.) To charge an indorser, it is not necessary to show that the notice of dishonor was actually received by him, nor even that it was addressed to him at his place of residence. (*Garver v. Downie*, 33 *Cal.* 176.) Notice left by a notary at the residence of the indorser, he being at the time absent, but not signed by any one, is insufficient to charge the indorser. (*Klockenbaum v. Pierson*, 16 *Cal.* 375.) If the notary in good faith use due diligence, and acts upon information from proper parties in mailing his notice, the indorser will be charged, notwithstanding the notice may be sent to the wrong place and never reach him. (*Garver v. Downie*, 33 *Cal.* 176.) Notice of protest of a note was left at the house in Washington of a member of Congress, after Congress had adjourned, and he had left the city as was his custom at such times. His domicile was in the district he represented, and his Washington house was occupied by strangers, by his permission, who did not pay rent. *Held*, that notice was not sufficient. *Bayly v. Chubb*, 16 *Grat. (Va.)* 284.

80. Notice, Sufficiency of.—A notice is sufficient, if from it it can be reasonably inferred that the note was presented and dishonored. (*Stoughton v. Swan*, 4 *Cal.* 213.) But if it state that the demand was made on a day subsequent to maturity, it will not bind the indorsers. (*Tevis v. Wood*, 5 *Cal.* 393.) The certificate need not state the form of notice given, as any notice is sufficient which informs the party, either by express terms, or by implication. (*McFarland v. Pico*, 8 *Cal.* 626.) Whether verbal or written, and even without description of the note, if at the time of receiving notice he knew the paper referred to, it is sufficient. (*Thompson v. Williams*, 14 *Cal.* 160.) Where notes are indorsed before maturity, the notice must state the time of the demand

and dishonor; but it is otherwise where the note was indorsed after maturity. (*Thompson v. Williams*, 14 *Cal.* 160.) A notice by the holder that he had "demanded payment of that note," implies a demand of the maker; and the declaration that he intended to look to the indorser for payment, implies non-payment. *Thompson v. Williams*, 14 *Cal.* 160.

81. Notice of Demand, Refusal, and Non-Payment.—

"That the note, on the day it matured, was presented for payment at the banking house of, and payment thereof demanded, and thereupon the same was duly protested for non-payment," is a sufficient notice of *demand*, refusal, and non-payment, to charge the indorser. *Eastman v. Turman*, 24 *Cal.* 379.

82. Notice, how Alleged.—Where the complaint against the indorser of a note alleges due demand, non-payment, and protest, and that due notice of such non-payment and protest was given, it is sufficient, without averring notice of demand also. (*Spencer v. Rogers Locomotive Works*, 17 *Abb. Pr.* 110.) A general averment of notice is sufficient to charge an indorser. 8 *Barn. & C.* 387; 2 *Mann. & R.* 359; *Dwight v. Wing*, 2 *McLean*, 580.

83. Notice—Allegation of Notice to Indorser Waived.

—That the defendant [indorser] thereafter waived the laches of the plaintiff in not giving him notice thereof, and promised to pay said note. A waiver of demand and notice by the indorser of a note does not require a stamp. *Guyther v. Bourg*, 20 *La. An.* 157.

84. Presentment.—The above allegation of presentment is sufficiently explicit. The fact that it was presented is alone material. (*Woodbury v. Sackrider*, 2 *Abb. Pr.* 402; *Gay v. Paine*, 5 *How. Pr.* 107; *Ferner v. Williams*, 14 *Abb. Pr.* 215; 37 *Barb.* 9; 1 *Handy*, 29.) The word "duly" need not be used. It is mere surplusage. (*Polly v. Saratoga and Washington R.R. Co.*, 9 *Barb.* 449; *People ex rel. Haws v. Walker*, 2 *Abb. Pr.* 421; *People ex rel. Crane v. Ryder*, 12 *N.F.* 433.) Nor need it be shown by whom it was presented. (*Boehm v. Campbell*, *Gow.* 55; *S.C.*, 5 *Eng. Com. L. R.* 459; and see *Hunt v. Maybee*, 7 *N.F.* 266.) An allegation of presentment by a bank does not imply ownership, but at most a holding as agent for another. (*Farmers' and Mechanics' Bank v. Wadsworth*, 24 *N.F.* 547.) It was alleged in a declaration that a note when due was presented to the bank for payment, to wit, 23d of July, 1841. *Held*, that the statement of the

date, being inconsistent with the allegation that the note was presented *when due*, should be rejected as surplusage. *Hyslop v. Jones*, 3 *McLean*, 96.

85. Presentment and Demand.—After presentment and demand, the liabilities of the parties become fixed. (*McFarland v. Pico*, 8 *Cal.* 626.) But the presentment and demand must be made in reasonable hours, and reasonable hours depend upon the question whether or not the bill is payable at a bank or elsewhere. (*Id.*) And when a promissory note is protested, the protest of a promissory note must be attended with all the incidents of a foreign bill of exchange. *Tevis v. Randall*, 6 *Cal.* 632.

86. Presentment—Allegation of Excuse for Non-Presentment—Maker not Found.—That at the maturity of said note, search and inquiry was made for said John Doe, at [*place of date of note*], that the same might be presented to him for payment; but he could not be found, and the same was not paid. **NOTE.**—State any facts relative to search and inquiry, and failure to find the party. Of course the allegation depends upon the facts in each case. As to sufficiency of this form, 2 *Chitt. Pl.* 134.

87. Promise to Pay.—There is a distinction between a promise by the indorser to pay, proved as presumptive evidence of actual notice, and a promise proved as evidence of a waiver. The former should not be alleged; the latter should. *Thornton v. Wynn*, 12 *Wheat.* 183; *Leonard v. Gary*, 10 *Wend.* 504; *Agan v. McManus*, 11 *Johns.* 180; *Lundie v. Robertson*, 7 *East*, 331; *Taylor v. Jones*, 2 *Campb.* 105; *Tebbetts v. Dowd*, 23 *Wend.* 379; *Miller v. Hackley*, 5 *Johns.* 375; *Duryee v. Denison*, *Id.* 248; *James v. O'Brien*, 26 *Eng. L. & Eq. R.* 283; *DeWolf v. Murray*, 2 *Sandf.* 166.

88. Protest.—There is no necessity of protesting a promissory note. A demand of payment and refusal, and notice to the indorser are all that is required. (1 *Pars. on Cont.* 238; *Edw. on Bills*, 268; 5 *Johns.* 375; 1 *N.Y.* 186; *McFarland v. Pico*, 8 *Cal.* 626; *Cole v. Jessup*, 10 *How. Pr.* 515.) It is but a form of evidence of demand and notice. (*Turner v. Comstock*, 1 *Code R.* 102.) A simple averment of presentment and refusal to pay is sufficient. *Price v. McClave*, 6 *Duer*, 544.

89. Protest, Averment of.—An averment of protest does not

imply a proper demand. (*Graham v. Machado*, 6 *Duer*, 515; *Price v. McClave*, *Id.* 544.) An averment that a note was *protested*, is not equivalent to an averment that it was duly presented for payment to the maker, and payment was refused. *Price v. McClave*, 3 *Abb. Pr.* 253; *Woodbury v. Sackrider*, 2 *Abb. Pr.* 402.

90. Reasonable Time.—To charge an indorser of a note payable on demand, presentment must be made within a reasonable time, and what constitutes a reasonable time depends upon the facts of each particular case. (*Keyes v. Fenstermaker*, 24 *Cal.* 329.) If delay has occurred, the holder must aver and prove the circumstances excusing the delay. (*Id.*) A delay of thirteen months was held unreasonable. *Jerome v. Stebbins*, 14 *Cal.* 457.

No. 239.

iii. *The Same—Against Maker and First Indorser.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, A. B., by his promissory note, promised to pay to the defendant, C. D., dollars, months after date.

II. That the said C. D. indorsed the same to the plaintiff.

III. That on the day of, 187., the same was presented to the said A. B. for payment, but was not paid.

IV. That notice thereof was given to the said C. D.

V. That they have not paid the same.

[*Demand of Judgment.*]

91. Change of Indebtedness.—Giving a note payable at a future time does not discharge the debt. (*Brewster v. Bours*, 8 *Cal.* 501; *Smith v. Owens*, 21 *Cal.* 11.) So, when a note is given for an account. (*Higgins v. Wortell*, 18 *Cal.* 330.) The substitution of a new security will discharge the indorser. (*Smith v. Harper*, 5 *Cal.* 329.) Where a person sued on a note which had two indorsements, signed by the payee, the first a receipt for the amount due, and the second in the words, “without recourse to me,” there was no presumption that the indorsements were made at different times, or that payment was voluntary and unconditional. *Frank v. Brady*, 8 *Cal.* 47.

92. Indorsement.—That the allegation of indorsement to the plaintiff is essential, consult *Flood v. Reynolds*, 13 *How. Pr.* 112.

93. Joint and Several Liability.—Persons severally liable upon the same obligation or instrument, may all be included in the same instrument. (*Cal. Pr. Act*, § 15; see further, *Ante*, “*Parties*,” p. 116, Note 164, *et seq.*) But the assignor and maker of non-negotiable paper cannot be joined in an action thereon by the assignee. *White v. Low*, 7 *Barb.* 204; and see *Allen v. Fosgate*, 11 *How. Pr.* 218; *Butler v. Rawson*, 1 *Den.* 105; *Tomlinson v. Willey*, 1 *How. Pr.* 247.

No. 240.

iv. *Indorsee against Maker, on Note Drawn to Maker's own Order.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, by his promissory note, promised to pay to bearer [*or to his own order*], dollars, months after date [*or on demand*].

II. That the same was by the indorsement of the defendant transferred to the plaintiff.

III. That defendant has not paid the same.

[*Demand of Judgment.*]

94. Indorsement Essential.—It would seem that when a note is drawn to the drawer's own order, the indorsement by the maker is necessary to pass the title. (*Macferson v. Thoytes*, *Peake's N. P. C.* 20; *Bosanquet v. Anderson*, 6 *Esp. R.* 43; *Smith v. Lusher*, 5 *Cow.* 688; *Titcomb v. Thomas*, 5 *Greenl.* 282.) But in New York, it is provided otherwise by statute. 2 *Rev. Stat. N. Y.* 53; and see *Plets v. Johnson*, 3 *Hill*, 112; *Masters v. Barrel*, 2 *Carr. & P.* 715; *S. C.*, 61 *Eng. Com. L. R.* 714.

No. 241.

i. *Subsequent Indorsee against Maker.*

[TITLE.]

The plaintiff complains, and alleges:

I. [*Allege making of note.*]

II. That the same was, by the indorsement of the said C. D. and L. M. and N. O. [*or* and others], transferred to the plaintiff.

III. That the defendant has not paid the same.

[*Demand of Judgment.*]

95. And Others.—The use of the words "and others" will perhaps obviate the necessity of proving the indorsements, which if stated must be proved. It is not necessary to state all the indorsements, as possession by plaintiff and production at the trial, is a legal presumption that he is the owner, and for value. (*Smith v. Schanck*, 18 *Barb.* 344; *James v. Chalmers*, 2 *Seld.* 209.) Nor to allege genuineness of indorsements. (*Pentz v. Winterbottom*, 5 *Den.* 51.) If the defendant on the trial prove loss or theft of the note in rebuttal of such presumption, the plaintiff may prove that he took the note in good faith, and for a valuable consideration. 1 *Duer*, 309; 23 *Barb.* 18; 2 *Dougl.* 633; 4 *Sandf.* 97; 1 *Mees. & W.* 425; 9 *Barnw. & C.* 208; 2 *Campb.* 5; 1 *Burr.* 452; 3 *Id.* 1,516.

96. Averment of Ownership.—The averment of ownership must be distinct and direct, and not by implication or legal conclusion

or presumption. (See *Ante*, Note 28; 8 *How. Pr.* 9; 4 *Duer*, 362; 4 *Abb. Pr.* 463; 2 *Campb.* 182; 1 *Salk.* 127; 5 *Wend.* 257; 12 *How. Pr.* 640; 3 *Duer*, 690.) That he is owner, is a sufficient averment. (*Rollins v. Forbes*, 10 *Cal.* 299.) Or that he is the "lawful holder." (*Catlin v. Gunter*, 1 *Duer*, 253; *Lee v. Ainslee*, 1 *Hill.* 277; 4 *Abb. Pr.* 463; *Benson v. Couchman*, 1 *Code R.* 119; 12 *How. Pr.* 321.) It is sufficient if he set forth the transfers to him. *Mitchell v. Hyde*, 12 *How. Pr.* 460; *Connecticut Bank v. Smith*, 17 *Id.* 487; 9 *Abb. Pr.* 168.

No. 242.

ii. *The Same—Against First Indorser—Indorsement Special.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to one A. B. a promissory note, made by one C. D., on the day of, 187., at, to the order of the defendant, for the sum of dollars, payable days after date.

II. That the same was, by the indorsement of the said A. B., transferred to the plaintiff [*or* that the said E. F. indorsed the same to the plaintiff].

[*Demand of Judgment.*]

No. 243.

iii. *The Same—Against Intermediate Indorser.*

[TITLE.]

The plaintiff complains, and alleges:

I. That a promissory note, made by one A. B., on the day of, 187., at, to the order of one C. D., for the sum of dollars

[payable days after date], and indorsed by the said C. D. to the defendant, was, by the indorsement of the defendant, transferred to the plaintiff.

II, III and IV [*Same as in 238*].

[*Demand of Judgment.*]

No. 244.

iv. *The Same—Against his Immediate Indorser.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to him a promissory note, made by one A. B., on the day of, 187., at, to the order of one C. D., for the sum of dollars, payable days after date, and indorsed by the said C. D. to the defendant.

II. III. and IV. [*As in Form No. 238.*]

[*Demand of Judgment.*]

No. 245.

v. *The Same—Against all Prior Parties.*

[TITLE.]

The plaintiff complains, and alleges:

L. That on the day of, 187., at, the defendant A. B., by his promissory note, promised to pay to the order of the defendant C. D., dollars, months after date.

II That the said C. D. indorsed the same to the defendant E. F., who indorsed it to the plaintiff.

III. That on the day of, 187., the same was presented [*or state facts excusing presentment*] to the said A. B. for payment, but it was not paid.

IV. That notice thereof was given to the said C. D. and E. F.

V. That the same has not been paid.

[*Demand of Judgment.*]

No. 246.

i. *Transfers not by Indorsement—By Assignee of Note.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, by his promissory note, promised to pay to the order of one A. B. dollars, days after date.

II. That said A. B. sold and delivered said note to the plaintiff [for a valuable consideration, before it was payable].

III. That the defendant has not paid the same.

[*Demand of Judgment.*]

97. Assessment and Apportionment.—The assessment or apportionment is a condition precedent, and must be averred and proved on the trial. (*Devendorf v. Beardsley*, 23 *Barb.* 656; *Williams v. Babcock*, 25 *Id.* 109; *Hurlbut v. Root*, 12 *How. Pr.* 511; *Williams v*

Lakey, 15 *Id.* 206.) And under what by-laws, and when, and how, it was ordered to be paid. (*Atlantic Ins. Co. v. Young*, 38 *N.H.* 451.) An indorsee of negotiable paper, issued by a corporation, in violation of the public laws of the state forbidding corporations to issue paper, cannot recover on the paper against the indorser. The contract being void, its contents cannot be received in evidence to support an action on it. 19 *Johns.* 6; 8 *Cow.* 20; *Root v. Wallace*, 4 *McLean*, 8; *Root v. Godard*, 3 *Id.* 102; *Davis v. Bk. of River Raisin*, 4 *Id.* 387.

98. Assignment.—An averment that the note was assigned on the day or at the time of its execution, is sufficient. (*Silver v. Henderson*, 3 *McLean*, 165; compare *Earhart v. Campbell*, *Hempst.* 49.) But consideration need not be averred. (*Wilson v. Codman*, 3 *Cranch*, 193; compare *McClintick v. Johnston*, 1 *McLean*, 414.) By the assignment of the note alleged, the plaintiff acquired title to the note, and the action, under the Code, could be maintained in his own name. *Savage v. Bevier*, 12 *How. Pr.* 166; *Hastings v. McKinley* 1 *E. D. Smith*, 273.

99. Assignee's Note.—In an action on a promissory note by an assignee, an averment that the note was issued on the day or at the time of its execution, is sufficient. (*Silver v. Henderson*, 3 *McLean*, 165; *Earhart v. Campbell*, *Hempst.* 49.) Under the common law, if it appeared from the declaration that the note was not yet payable, a demurrer would lie. (*Waring v. Yates*, 10 *Johns.* 119; *Lowry v. Lawrence*, 1 *Cai.* 69.) If the complaint, not verified, sets out the note, and avers assignment by payee to plaintiff, and the answer is a general denial, the plaintiff must prove the assignment. *Hastings v. Dollarhide*, 18 *Cal.* 390.

100. Bearer.—In an action against the maker of negotiable paper payable to bearer, it is sufficient, after alleging that the defendants drew it, to allege that it was transferred and delivered to the plaintiff, without saying by whom, if it be also alleged that the transfer was for value, and that the plaintiff is the owner. (*Mechanics' Bank v. Straiton*, 5 *Abb. Pr.* (N.S.) 11.) The allegation on a note payable to bearer is sufficient, if it allege that it is his property, and that the amount is due. (*Dabney v. Reed*, 12 *Iowa*, 315.) In case the note is payable to the order of a fictitious person, and in case it is payable to the maker's own order, it is in law payable to bearer. *Minet v. Gibson*, 1 *H. Blackst.* 569; *Plets v. Johnson*, 3 *Hill*, 112.

101. "Before Maturity," "For Value."—The words "before its maturity," and "for value," are not material to the cause of action. Unless the contrary is shown, the indorsement will be presumed to have been made before maturity. *Pinkerton v. Bailey*, 8 *Wend.* 600; *Pratt v. Adams*, 7 *Paige*, 615; *Nelson v. Cowing*, 6 *Hill*, 336; *Case v. Mechanics' Banking Association*, 4 *N.F.* 166; and see *James v. Chalmers*, 6 *N.F.* 209.

102. "Information and Belief."—In an action upon promissory notes assigned to the plaintiff, and for goods sold: *Held*, that the plaintiff might properly allege in his complaint, on his "information and belief," that the notes were executed by the defendant; and he might allege in the same way that the goods were sold to the defendant; for they might have been sold by his agent. A motion to strike out the words "on information and belief," was therefore denied. *St. John v. Beers*, 24 *How. Pr.* 377.

103. Law of Place.—An assignment of a negotiable instrument, as between the parties to that assignment, is subject to the law of the place where the assignment is made; and if by such law the assignment is void, as against law, the assignee can exercise no right under such assignment. (5 *East.* 123; 12 *Johns.* 142; 3 *Mass.* 77; *Conf. of Laws*, § 314; *McClintick v. Cummins*, 3 *McLean*, 158; *Dundas v. Bowler*, 3 *McLean*, 397.) And what is a discharge of a contract, in a place where it was made, will be of equal avail in every other place. Except that where a contract is to be executed at a place different from that where it is made, the law of the place of execution will apply. *Van Reimsdyk v. Kane*, 1 *Gall.* 371.

104. Note with Blank for Name of Payee, how Pledged.—Where, in an instrument for the payment of money, the name of the payee is left blank, with the intention that such instrument may be transferred by delivery, since any lawful holder may fill the blank with his own name as payee, he may plead it in an action thereon as having been delivered to some persons unknown, for a consideration from them received, and as having thereafter come lawfully into plaintiff's possession, and that he is the owner thereof. (*Hubbard v. N.Y. and Harlem R.R. Co.* 14 *Abb. Pr.* 275.) There must be two parties to every promissory note, a maker and a payee; if the payee named is not *in esse*, there is no note. *Wayman v. Terreyson*, 4 *Nev. Rep.* 124.

105. Partnership and Individual Liability.—A complaint would seem to be bad which shows a partnership note as a cause of action against an individual. If there was no real firm, it should have been alleged that the note was signed by A. B. in the name of A. B. & Co. The words "& Co." indicate a firm. The defendant may have been a member of that firm, and yet never have made the note, nor have had any knowledge of its existence. It may have been the objection is not strictly for defect of parties, but that the complaint does not, on its face, show an individual liability on the part of "A. B." *Price v. McClave*, 6 *Duer*. 544; aff'g S.C., 5 *Id.* 670.

106. Plaintiff's Title.—In an allegation on a note payable to a third person, the right of plaintiff should be alleged. (*Montague v. Reiniger*, 11 *Iowa*, 503; *Bennett v. Crowell*, 7 *Minn.* 385.) And if the answer does not deny the allegation, defendant cannot prove that payee had no capacity to transfer. *Robbins v. Richardson*, 2 *Bosw.* 248.

107. Sufficient Allegation.—In an action against one A. B. as the maker, and others as indorsers of a promissory note, the complaint set forth a copy of the note signed A. B. & Co., upon which it alleged the defendants were indebted, etc. The word "signed" was prefixed to the name of the makers, and the word "indorsed" was prefixed to the names of the indorsers in the copy; but there was no other allegation that the defendants made or indorsed the note, except that it was alleged that the note was "written," and that it was passed to the plaintiff. *Held*, on demurrer, that the making and indorsement should be deemed sufficiently alleged. *Phelps v. Ferguson*, 9 *Abb. Pr.* 206; *Lee v. Amsley*, 1 *Hilt*, 277; 4 *Abb. Pr.* 463; *Griswold v. Laverty*, 12 *N.Y. Leg. Obs.* 316; *Bank of Geneva v. Gulick*, 8 *How. Pr. R.* 51.

108. Transfer.—An allegation that a corporation indorsed and transferred and delivered to the plaintiffs the note sued on, sufficiently implies that the transfer was made pursuant to a resolution of the board of directors, if such resolution is necessary. So an allegation, that after the transfer the company became insolvent and was dissolved, is an indirect statement that it was solvent when the transfer was made. (*Nelson v. Eaton*, 15 *How. Pr.* 305; *Taylor v. Corbiere*, 8 *How. Pr.* 385; but see *Montague v. King*, 37 *Miss.* (8 *George*) 441.) Yet all necessary allegations should be *directly* made.

No. 247.

ii. *By the Treasurer of an Unincorporated Company, on a Note Payable to the Former Treasurer.*

[TITLE.]

The plaintiff complains, and alleges :

I. That the Mountain View Homestead Association is an association consisting of persons, in the City of, in this State.

II. That at the time hereafter mentioned, one A. B. was the treasurer thereof.

III. That on the . . . day of, 187., the defendant made his promissory note, of which the following is a copy: [*Copy of note*—and thereupon delivered the same to said A. B., as the treasurer of the association, who was duly authorized to receive it on their behalf.

IV. That said note was given for the benefit of the association, and that it is the property of the members thereof, and owned by them in common.

V. That this plaintiff is now the treasurer of said association, and, as such, is the lawful holder of said note on and for their behalf.

VI. That the defendant has not paid the same.

[*Demand of Judgment.*]

109. Homestead Associations.—Such associations, under the statutes of California, are incorporated pursuant to the statute. Hence the above form is not strictly applicable in this State.

110. Owned by them in Common.—Several individual demands accruing to the members, cannot be recovered in such an action.

(*Corning v. Green*, 23 *Barb.* 33.) For allegation of common interest, and as to interest of officer, see *Camden Bank v. Rodgers*, 2 *Code R.* 45; 4 *How. Pr.* 63.

No. 248.

iii. *On a Note Payable on a Contingency.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, the defendant made and delivered to the plaintiff his promissory note, in writing, of which the following is a copy:

\$300

Shasta, 1st *January*, 1869.

For value received, I promise to pay to A. B., one year after date, three hundred dollars, in case the proceeds of the newspaper route I have this day bought of him shall exceed the sum of one thousand dollars.

C. D.

II. That the proceeds of said newspaper route did, before the expiration of said year, exceed the sum of one thousand dollars.

III. That no part of the said note has been paid.

[*Demand of Judgment.*]

III. Condition Precedent.—Where a note was made payable on the contingency of the confirmation of a grant of land, the confirmation was a condition precedent to the payment of the note. (*Sanders v. Whitesides*, 10 *Cal.* 88.) Where the complaint on a promissory note shows that, by agreement of the parties, its payment was made conditional upon the payment, by the payee, of a certain debt of the payor, such payment is a condition precedent to plaintiff's right to recover on the note, and must be averred in the complaint to have been made. *Rogers v. Cody*, 8 *Cal.* 324.

*No. 249.**iv. On Note Payable in Chattels.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, for value received [*or, where the consideration is expressed in the note*, for a valuable consideration therein expressed], made and delivered to plaintiff his promissory note, of which the following is a copy:

For value received, thirty days after date, I promise to pay A. B. five hundred dollars, in clothing, at the usual market rates; the same to be delivered within two days after the same is selected or demanded by the said A. B.; and on default thereof, I agree to pay the said amount in money.

January 1st, 1869.

C. D.

II. That the plaintiff thereafter demanded of defendant the said clothing, but defendant refused to deliver it, or any part thereof to him [*or that the plaintiff thereafter performed all the conditions of the same on his part*].

III. That no part has been paid.

[*Demand of Judgment.*]

112. Consideration.—Consideration in such complaints may be specially set out. (*Ward v. Sackrider*, 3 *Cai.* 263.) And if so stated, must be proved as laid. (*Jerome v. Whitney*, 7 *Id.* 321.) It must be averred, when the instrument itself does not import a consideration. (*Spear v. Downing*, 34 *Barb.* 522; *Lancing v. McKillip*, 3 *Cai.* 286.) In case the consideration be subject to transfer on demand of payment,

the plaintiff must allege a transfer or tender of transfer. *Considerant v. Brisbane*, 14 *How. Pr.* 487.

113. Demand.—The demand should be made at the place of business of the maker of the note, when the note is payable in chattels. (*Vance v. Bloomer*, 20 *Wend.* 196; *Rice v. Churchill*, 2 *Den.* 145.) But if the day of delivery of chattels be defined in the note, as "on or before" a day named, no demand is necessary, unless the holder exercises an election as to choice of goods. (*Johnson v. Seymour*, 19 *Ind.* 24.) The payee of a note of forty dollars, payable on demand, in "hemlock bark, at the going price," in the summer of 1863, requested the maker to have the bark peeled in the course of the summer (the peeling season), and delivered the next winter, which the maker agreed to do. The bark was not delivered. *Held*, that the demand was appropriate to the note, and that on defendant's failure to furnish the bark the payee could recover on the money counts. *Reed v. Sturtevant*, 40 *Vt.* 521.

114. Effect of Indorsement.—The indorser of such a note has no right to insist on a previous demand on the maker, but is immediately liable thereon. *Seymour v. Van Slyck*, 8 *Wend.* 403; affirmed, *sub nom.* *Stone v. Seymour*, 15 *Id.* 9.

115. Maturity.—It seems such notes are generally due on demand, and a special demand is necessary. *Lobdell v. Hopkins*, 5 *Cow.* 516; but see *Barnes v. Graham*, 4 *Id.* 452.

116. Measure of Damages.—Upon such notes, the measure of damages is the sum of money named. *Pinney v. Gleason*, 5 *Wend.* 393; *Rockwell v. Rockwell*, 4 *Hill*, 164; and see *Gilbert v. Danforth*, 6 *N.Y.* (2 *Seld.*) 585.

117. Non-Payment.—The allegation of non-payment of the money is, alone, sufficient. *Rockwell v. Rockwell*, 4 *Hill*, 164.

*No. 250.*i. *On Guaranties—Against Maker and Guarantor of a Promissory Note.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant A. B., and C. D. as his security, by their promissory note, promised to pay to the order of one E. F., dollars, [..... days after date].

II. That the said E. F. indorsed the same to the plaintiff.

III. That on the day of, 187., the same was presented [*or state facts excusing presentment*] to the said A. B. for payment, but was not paid.

IV. That notice thereof was given to the said C. D.

V. That the defendants have not paid the same.

[*Demand of Judgment.*]

118. Certificate of Deposit.—Where the indorsee, on payment to him of the amount, guaranties the genuineness of the signature, which is afterwards found to be a forgery, and the payee recovers from the makers the amount of certificate and costs, the maker may recover from the indorser and guarantor the costs of the former action. *Mills v. Barney*, 22 Cal. 240.

119. Demand and Notice.—Where it is agreed “that if the holder should not be able to collect the note from the maker by due course of law, then the guarantor would be responsible without requiring notice,” it is a waiver of demand on the maker. (*Backus v. Shepherd*, 11 Wend. 629.) A note indorsed “I guarantee the collection of the within note when due,” contemporaneous with the signing of the note, constitutes

a guaranty, and the party is entitled to legal notice of non-payment before he can be charged on his contract. (*Reeves v. Howe*, 16 *Cal.* 152.) A complaint is insufficient which treats the maker and guarantor of a note as joint makers, and contains no allegation of demand and notice. (*Lightstone v. Laurencel*, 4 *Cal.* 277.) "I assign the within to K., for value received, and bind myself to pay it promptly after maturity," indorsed upon a note, is a guaranty, and demand and notice are not necessary to fix the guarantor's liability, on failure of the makers to pay at maturity. (*Baker v. Kelley*, 41 *Miss.* 696.) So, in case of a lease. (*Voltz v. Harris*, 40 *Ill.* 155.) It is the same with a promissory note, with the guaranty written upon it. *Allen v. Fosgate*, 11 *How. Pr.* 218.

120. Discharge of Surety.—Mere extension of time to the maker is not sufficient to discharge a surety or indorser, unless it will be such as will suspend the right of action against the maker. (*Williams v. Covilland*, 10 *Cal.* 419; *Reynolds v. Ward*, 5 *Wend.* 501; *Draper v. Romayn*, 18 *Barb.* 166.) The failure of a holder of a note to sue, when requested by the surety, does not in general operate to discharge the liability of the latter. (*Hartman v. Burlingame*, 9 *Cal.* 557.) If the surety desires to protect himself, he must pay the note, and proceed against the principal. *Id.*

121. Guarantor, who is.—One who puts his name upon a promissory note, out of the usual course of regular negotiability, is a guarantor, whether inscription is in blank or accompanied by the words, "I guarantee," etc. (*Riggs v. Waldo*, 2 *Cal.* 485; *Chitt. on Cont.* 397; 3 *Kent's Com.* 121.) Or, if the indorser accompanies his signature with the words, "I hereby waive demand, notice of non-payment, and protest," he is a guarantor. *Ford v. Hendricks*, 34 *Cal.* 673; see, also *Brady v. Reynolds*, 13 *Cal.* 31; *Story on Prom. Notes*, § 434; *Fell's Law of Guar. & Sur.* 1; *Hall v. Farmer*, 5 *Den.* 484; *Miller v. Gasten*, 2 *Hill*, 191; 2 *Wend.* 630.

122. Guarantor and Surety.—Where the holder of a note, after its maturity, obtained from a stranger a guaranty of its payment within sixty days from date of guaranty, there is no presumption of law that the guaranty was taken for the benefit of the maker, or that it extended to him the time of payment. *Williams v. Covilland*, 10 *Cal.* 419.

123. Joint Liability.—Each one who writes his name upon a promissory note is a party to it, and each party an original undertaker.

(*Riggs v. Waldo*, 2 *Cal.* 485.) As the note itself imports consideration. (*Id.*) Where a party signs a joint and several note, he is not entitled to notice of non-payment, though in fact he signed as surety. (*Hartman v. Burlingame*, 9 *Cal.* 557; *Duane v. Corduan*, 24 *Cal.* 157; *Humphreys v. Crane*, 5 *Id.* 175.) When a promissory note is signed by two persons in the same manner, with nothing to show that one was surety, one of such signors cannot set up that he was a surety only. (*Kritzer v. Mills*, 9 *Cal.* 21.) Where, in the body of the note, one party signs as principal, and one as surety, both are liable. *Humphreys v. Crane*, 5 *Cal.* 173.

124. Liability of Guarantor.—The liability of an indorser is a guaranty that he will pay, if the maker does not, upon presentment, if he receive notice. And the liability of a guarantor is the same, and he is entitled to all his rights, *stricti juris*. (*Riggs v. Waldo*, 2 *Cal.* 485; *Ford v. Hendricks*, 34 *Cal.* 673; *Pierce v. Kennedy*, 5 *Cal.* 138.) Defendant signed a negotiable note, as surety, and delivered it to his principal, on the condition that it should not be delivered to the payee, or negotiated, until another party should have signed the same as co-surety. It was delivered without such other signature, but the payee did not know of said condition, and there was nothing on the face of the note to put him on inquiry. *Held*, that defendant was liable. *Merriam v. Rockwood*, 47 *N.H.* 81; see *Hoboken City Bank v. Phelps*, 34 *Conn.* 92.

125. Nature of Contract.—A guaranty is an independent contract, which does not suspend any right of action of the holder of the note against its maker. (*Williams v. Covilland*, 10 *Cal.* 419.) An indorsement, or a guarantee of a note, is an agreement of itself, a new contract undertaken for another. (*Aud v. Magruder*, 10 *Cal.* 282.) The contract of indorsement is primarily that of transfer; the contract of guaranty is that of security. *Brady v. Reynolds*, 13 *Cal.* 31.

126. Notice of Protest.—A notice of protest is as essential to charge a guarantor as an indorser; (*Riggs v. Waldo*, 2 *Cal.* 485; *Brady v. Reynolds*, 13 *Cal.* 31;) as the liability of the guarantor is the same as that of the indorser, and he is entitled to all his rights *stricti juris*. (*Riggs v. Waldo*, 2 *Cal.* 485.) As to waiver of notice of protest, see (*Id.*; *Pierce v. Kennedy*, 5 *Cal.* 139; *Geiger v. Clark*, 13 *Cal.* 580; *Brady v. Reynolds*, 13 *Cal.* 31.) "I hereby waive demand, notice of non-payment and protest, Q. R.," indorsed on a note by a third party before it is

delivered by the maker, is a guaranty, and not within the Statute of Frauds. *Ford v. Hendricks*, 34 *Cal.* 673.

127. Primary Liability.—One who signs a note to pay absolutely at a certain time, is making his own contract, although he put "surety" with his name. (*Aud v. Magruder*, 10 *Cal.* 282.) When, in consideration of a conveyance, a party agrees to pay an outstanding note of his vendor, and writes his name on the back of the note as a memorandum of said agreement, he is primarily liable for the note. *Palmer v. Tripp*, 8 *Cal.* 95.

128. Promise.—The promise of a guarantor of a note seems not to be within the Statute of Frauds, if made before the delivery of the note. *Riggs v. Waldo*, 2 *Cal.* 486; *Evoy v. Tewksbury*, 5 *Cal.* 285; *Jones v. Post*, 6 *Cal.* 102; *Hazeltine v. Larco*, 7 *Cal.* 32; *Otis v. Hazeltine*, 27 *Cal.* 80.

129. Surety—Security.—As to the effect of the word "surety" or "security," added to the name of the indorser of a note, see (*Bradford v. Corey*, 5 *Barb.* 461; 10 *Cal.* 282.) The word "surety" does not in any way control the words of the note, as between the payor and payee. (*Aud v. Magruder*, 10 *Cal.* 282.) Where three parties purchased property together, one taking an undivided half, and each of the others taking an undivided fourth, and for the purchase-money executed their joint note, the purchaser of the one-half interest was a principal and a co-surety with the others for their interests. (*Chipman v. Morrill*, 20 *Cal.* 130.) Where a promissory note was made jointly by A. and B., and delivered to C., the consideration being delivered to A. alone, and as between A. and B., the latter signed as surety for A., who had deposited collateral security with C., of which transaction as a whole C. had notice when the note was executed. As between the makers and the payee, A. and B. were principals, and liable as such to C. *Danion v. Pardow*, 34 *Cal.* 278.

130. Trustee.—Where a party signs a promissory note, with the addition to his name of the word "trustee," he is personally liable. (*Conner v. Clark*, 12 *Cal.* 168.) A note stating that "we, the undersigned, trustees of, etc., on behalf of the whole board of trustees of said association, promise to pay," etc., and signed without qualification by two persons having authority, is a note of the association. *Haskell v. Cornish*, 13 *Cal.* 45.

131. What Contract Imports.—The difference between a maker and indorser or guarantor, is that the contract of the first imports an unconditional obligation, that of the last a conditional obligation. *Aud v. Magruder*, 10 *Cal.* 282.

132. When Action Lies.—Where a guaranty is given in consideration of an extension of time to the maker, the holder of the note must exhaust his remedy on the original demand, and he can then compel the guarantor to make good the deficiency. (*Donahue v. Gift*, 7 *Cal.* 242; but see, also, *Gross v. Parrott*, 16 *Cal.* 143.) A creditor having legally fixed the liability of the guarantor, is not bound to sue the debtor in order to hold the guarantor. The guarantor should pay the debt, and then sue the principal, or file a bill to compel the creditor to sue. *Whiting v. Clark*, 17 *Cal.* 407.

COMPLAINTS—SUBDIVISION FOURTH.

For Damages on Breach of Contract.

CHAPTER I.

BUILDERS' CONTRACTS.

No. 251.

- i. *By Contractor, on Special Contract, Modified, with a Claim for Extra Work.*

[TITLE.]

The plaintiff complains, and alleges:

First.—For a first cause of action:

I. That on the day of, 187., at, the defendant, under his hand and seal, made a contract in writing with the plaintiff, of which the following is a copy: [*Copy contract.*]

II. That he has duly performed all the conditions thereof on his part, except that, at the request of the defendant, he finished the building with hard finish instead of cloth and paper, for which the defendant promised to pay a reasonable sum, in addition to the price named in the contract. That by the consent of the defendant, the time for completing said work was extended for one month beyond the time fixed by the contract, to wit, to the day of, 187..

III. That the plaintiff, on his part, duly performed all the conditions of said contract as modified.

IV. That the sum of dollars is a reasonable payment to be made in addition to the price named in said contract, for finishing the building with hard finish, instead of cloth and paper.

V. That on the day of, 187., at, the plaintiff demanded of the defendant payment of the sum of dollars, the amount due on said contract as modified.

VI. That he has not paid the same.

Second.—For a second cause of action.

I. That between the day of, 187., and the day of, 187., at, the plaintiff rendered further services, and furnished materials to the defendant, at his request, in [*here state extra work and material*], for which the defendants promised to pay.

II. That the same are reasonably worth dollars.

III. That he has not paid the same.

[*Demand of Judgment.*]

1. Abandonment of Contract.—If the contract for the erection and completion of a building is entire, and the contractor abandons the work before it is completed, he loses the right which he would have had to the full compensation agreed on. *Blythe v. Poultney*, 31 *Cal.* 233.

2. Acceptance of Work.—Where the work has been accepted and approved by the Superintendent, under a contract for repairs of streets, it is a full performance of the contract; and if the parties are dissatisfied they should have appealed to the Board of Supervisors. This was

their only remedy. (*Emery v. Bradford*, 29 *Cal.* 75; *Taylor v. Palmer*, 31 *Cal.* 248; *Beaudry v. Valdez*, 32 *Cal.* 278.) That the defendants demanded possession, which the plaintiff delivered up to them, is not a sufficient averment of acceptance on the part of the plaintiff. (*Smith v. Brown*, 17 *Barb.* 431.) Where the work was to be done to the satisfaction of the defendant, it is not necessary to aver that it was done to his satisfaction, if it is shown to be according to the contract; but if the contract requires it to be done to the satisfaction of third persons, the plaintiff must aver that it was done to their satisfaction. *Butler v. Tucker*, 24 *Wend.* 447.

3. Averments Essential.—Under the rules of pleading established by the Code, the party to a written contract for the erection of a building, who has performed his part of it by the erection of the same, can bring an action against the other party who has failed to fulfill, for work and labor done and performed; but the complaint must aver the execution of the contract, its terms, the performance of the same on the part of the plaintiff, and the non-performance by the other party, and the damages thereby sustained. *O'Connor v. Dingley*, 26 *Cal.* 17.

4. Contract Set Forth.—The contract should be set forth in the complaint, together with the necessary allegations of deviations, performance, etc., which the plaintiff must prove, instead of the general allegation that the defendant is indebted for work and labor, etc. *Green v. Palmer*, 15 *Cal.* 412; *Jerome v. Stebbins*, 14 *Cal.* 457; cited in *O'Connor v. Dingley*, 26 *Cal.* 21.

5. Corporation Work.—On a written contract to build certain bridges for a railroad company, the performance of which would require several months, to be paid for, one fourth in cash, and the rest in stock, no time and place of payment stated: the payment could not be required until the terms of the contract were complied with, or at least that payment on any bridge was not due until such bridge was completed. And where no time or place is fixed by the agreement, express or implied, a demand is essential to base an action upon. (*Brody v. Rutland and Burlington R.R. Co.*, 3 *Blatchf.* 25.) But after performance in such a contract, an action will lie without proof of the demand of the stock. *Hallihan v. Corporation of Washington*, 4 *Cranch C. Cl.* 304.

6. Enlargement of Time.—The time of performing a simple written contract may be enlarged by parol. (*Keating v. Price*, 1 *Johns. Cas.* 22; 3 *Johns.* 528; 1 *Barb.* 327; 12 *Barb.* 366; *Clark v. Dales*, 20 *Id.*

42; *Stone v. Sprague*, *Id.* 509; *Flynn v. McKeon*, 6 *Duer*, 203.) But not unless the parol contract be upon sufficient consideration. (*Tinker v. Geraghty*, 1 *E. D. Smith*, 687.) And the extension is not an alteration necessarily material to the cause of action. (*Crane v. Maynard*, 12 *Wend.* 408.) But after a contract is modified, the declaration must not be upon the original contract alone. *Freeman v. Adams*, 9 *Johns.* 115; *Baldwin v. Munn*, 2 *Wend.* 399; *Id.* 587; *Phillips v. Rose*, 8 *Johns.* 392.

7. Extra Work.—It was held that the contractor cannot recover for extra work, merely upon the proof that such work was done at defendant's request. (*Collyer v. Collins*, 17 *Abb. Pr.* 469.) The employer is bound to pay the contractor for extra work and materials, in a deviation from the contract, upon an oral order. *Smith v. Gugerty*, 4 *Barb.* 614.

8. Missouri.—Under the provision of the Act of January 16, 1860, for the payment of the cost of constructing and repairing streets in St. Louis, by the abutters thereon, to be collected by the contractor of the work to his own use, it was *held*, that in a suit by the contractor to recover such cost, it is not necessary that the contract between himself and the City should be set out in the petition. Such suit must be brought in the name of the City, to the use of the contractor. *St. Louis v. Hardy*, 35 *Mo.* 261.

9. Omission to Fix Time and Manner.—When a contract for the construction of a public work is silent as to time and manner of measurement, the law implies that the work is to be done of the ordinary kind, and the measurement made in the ordinary way. *Alaire v. United States*, 1 *Nott. & H.* 233.

10. Order of Averments.—The plaintiff may plead as follows: *First*, He may set forth the contract according to its legal effect, *as modified*, and then allege that he has duly "performed all the conditions thereof on his part;" or, *Second*, he may set forth the contract in *hac verba*, and then state that he has duly performed, etc., all the conditions thereof on his part, except that in certain points it was subsequently modified, and that in those points he fulfilled it according to the modifications. *Smith v. Brown*, 17 *Barb.* 431; see, also, *Hatch v. Peet*, 23 *Id.* 575.

11. Payment—Terms of.—When, by the terms of the contract, payment was to be made upon a certificate of the architect, "that the

work was fully and completely finished according to the specifications," the giving of a certificate to that effect must be averred and proved. (*Smith v. Briggs*, 3 *Den.* 73.) But where payment was to be made upon a certificate of an officer, the complaint should allege that he had made such certificate. It need not be averred also that the work had been performed. *Towsley v. Olds*, 6 *Clark (Iowa)*, 526.

12. Performance must be Complete.—In a contract for the erection of a building upon the land of another, if performance is to precede payment and is the condition thereof, the builder having substantially failed to perform according to the specification of the contract on his part, can recover nothing for his labor and materials, notwithstanding the owner has chosen to occupy and enjoy the erection. 3 *Tuunt.* 52; 12 *Johns.* 165; 13 *Id.* 53, 94; 13 *Wend.* 258; 18 *Id.* 87; 5 *Den.* 406; 4 *Comst.* 360; 5 *Seld.* 93; *Smith v. Brady*, 17 *N.Y.* 173; compare, to the contrary, *Hayward v. Leonard*, 7 *Pick.* 181; *Smit v. Congregational Meeting House*, 8 *Id.* 178; *Britton v. Turner*, 6 *N.H.* 487; which were disapproved in the cases first cited.

13. Performance—Literal Compliance.—Building contracts need not be literally complied with in every punctilio, as a condition to recovery. (*Smith v. Gugerty*, 4 *Barb.* 614.) Where there was a special contract to build a house by a certain day, which was not fulfilled, owing to various circumstances, and the contractor brought a suit setting forth the special contract and averring performance, it was erroneous in the Court to instruct the jury to find for the plaintiff, as the work was not finished by the appointed day, though it was completed after the appointed time with the knowledge and approbation of the defendant. *Dermott v. Jones*, 23 *How. U.S.* 220.

14. Performance how Averred.—The pleader may aver performance which he wishes to aver, and state excuses and causes for non-performance of other conditions. For the rules on the subject of averment of performance of conditions precedent, see "*Complaints in General*," pp. 229-36; see, also, 1 *Chitt. Pl.* 283; *Hatch v. Peet*, 23 *Barb.* 575.

15. Public Works.—Contracts for the construction of public works are not necessarily illegal because for an amount exceeding the sums appropriated by law. (*Cook v. Hamilton Co.*, 6 *McLean*, 112.) So, a contract for the performance of certain public work, not authorized by law, provided the Legislature shall sanction it, is not void as against

public policy. *Id.*; see, also, to similar effect, *Columbus R.R. Co. v. Indianapolis and Bellefontaine R.R. Co.*, 5 *McLean*, 450.

16. Separate Counts.—The complaint contained three counts: the first, on a special contract for the erection of a warehouse; the second, for extra work on the building; and the third, for work and labor done, and materials furnished in its erection. The answer denied the allegations of the first two counts, but failed to deny the allegations of the third. *Held*, that the third count should be considered as denied. *Kalkman v. Baylis*, 23 *Cal.* 303.

17. Substitute.—An agreement to find work and materials for building a house, entitles the party to recover upon the completion of the work, although he procured it to be done by other parties. (*Blakeney v. Evans*, 2 *Cranch*, 185.) If a new contract was substituted, the original should not be pleaded. *Chesborough v. N.Y. and Erie R.R. Co.* 26 *Barb.* 9.

18. Terms of Contract.—Upon a compliance on the part of a sub-contractor, laborer, or material man, with the terms of the statute, their right, which through the original contractor inures primarily to the benefit of such persons, must be determined by the terms of the original contract, and they are presumed to have notice of the existence and terms of such contract. (*Shaker v. Murdock*, 36 *Cal.*) And in the absence of fraud or misrepresentations by the owner, this presumption is conclusive against them. (*Henley v. Wadsworth*, *Cal. Sup. Ct.*, *Jul. T.*, 1869.) If, by the terms of the contract, the party who has failed to fulfill was to execute his note for the money due, payable at a future day, his failure to do so should be averred, for the ground of action against him is his failure to execute the note. *O'Connor v. Dingley*, 26 *Cal.* 17.

19. Valid and Void Contracts.—The City of Detroit had power by its charter to pave its streets, but all contracts were to be made with the lowest bidder. It contracted for the Nicolson pavement, the only bidder being the patentee, who had a monopoly. *Held*, that the contract was legal. (*Hobart v. City of Detroit*, 17 *Mich.* 246; *contra*, *Dean v. Charlton*, *Wis.*; 3 *Am. Law Rev.* 170; and in California, *Nicolson Pavement Co. v. Fay*, 35 *Cal.* 695.) Such contracts would be held void or valid, according to the interpretation of the city charter under which they are let.

20. Variation of Terms.—If there has been any variation from the terms of the written contract in the progress of the work, by consent of the parties, that fact should also be averred, and the performance of the contract as varied. *O'Connor v. Dingley*, 26 Cal. 17.

No. 252.

ii. *Against a Builder, for Defective Workmanship.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant entered into an agreement, of which a copy is hereto annexed [*or state the terms of the contract*].

II. That the plaintiff duly performed all the conditions of the said agreement on his part.

III. That the defendant built [the bridge] referred to, in a bad and unworkmanlike manner.

[*Demand of Judgment.*]

No. 253.

iii. *Against a Builder, for not Completing, with Special Damage for Loss of Rent.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and the defendant entered into an agreement, under their hands and seals, of which a copy is annexed as a part of this complaint, marked "Exhibit A."

II. That the plaintiff duly performed all the conditions thereof on his part.

III. That the defendant entered upon the performance of the work under said contract, but has neglected to finish the said contract [*state what he has neglected*], and that although the time for the completion of said building expired before this action, he neglects and refuses to complete the same.

IV. That the plaintiff, on the day of, 187., at, made an agreement with one A. B., whereby he agreed to let, and said A. B. agreed to hire, the said building for months, from the day of, 187., to the day of, 187., at the monthly rent of dollars, of which the defendant had notice.

V. That by reason of the defendant's failure to complete the contract aforesaid upon his part, the plaintiff has been unable to give said A. B. occupancy thereof, and has been thereby deprived of the profits of said lease, to his damage dollars, gold coin.

[*Demand of Judgment.*]

[*Annex Agreement, marked "Exhibit A."*]

21. Change in Form of Structure.—Where the contract gives the employee the right to change the form and the material, the builder has not the right upon such a change to stop the work in an unfinished state, and thus arbitrarily annul the contract. *Clark v. Mayor of N.Y.*, 4 *N.P.* 338.

22. Covenant with Penalty.—A covenant in a contract to erect and complete a building by a certain day, under a penalty of \$30 for every day the same should remain unfinished, is not an absolute covenant to finish it on that day. *Farnham v. Ross*, 2 *Hall*. 167.

23. Damages by Recoupment.—Where the plaintiff fails to perform by the day fixed, the defendant's consenting to his going on and completing the contract afterwards is no waiver of the right to recoup his damages for the delay. 14 *Wend.* 257; 22 *Id.* 155; 24 *Id.* 69; 3 *Hill*, 171; 20 *Wend.* 51; 1 *Cr. & Mees.* 832; *Id.* 840; *Barber v. Rose*, 5 *Hill.* 76.

24. Destruction by Fire.—One who has agreed to build a house on the land of another, and has substantially performed his contract, but has not completely finished the house, nor delivered it, when it is destroyed by fire, is liable in an action for money advanced upon the contract, and damages for its non-performance. 11 *N.Y.* 35; 1 *Taunt.* 218; 7 *Johns.* 473; 19 *Pick.* 275; 12 *N.Y.* 99; 25 *Conn.* 530; 3 *Dutch.* 514; *Tompkins v. Dudley*, 25 *N.Y.* 272.

25. Execusable Delay.—If the delay on the part of the contractor to perform the work is caused by want of readiness in the work performed by another contractor, he cannot be held liable for a breach of his contract, nor forfeit his right to recover for what he has done. *Stewart v. Keteltas*, 9 *Bosw.* 261.

26. Furnishing Materials.—A written contract to furnish articles for a building, mentioning no time for performance, is to be performed in a reasonable time, and oral evidence that a certain time was agreed on by the parties is not admissible. *Strange v. Wilson*, 17 *Mich.* 342.

27. Plan and Specifications.—If a contract to do work provides that the work shall be done according to certain specifications, which are annexed to it, the specifications are a part of the contract. (*Taylor v. Palmer*, 31 *Cal.* 241.) If the contract is not annexed and made part of the complaint, the allegation should embody sufficient of the plan and specifications to show, in connection with the averment of the breach, in what particular the contract was broken. (*Cooney v. Winants*, 19 *Wend.* 504.) An averment may be made sufficiently certain by introducing and referring to diagrams showing form and dimensions, etc. *Booker v. Ray*, 17 *Ind.* 522.

28. Refusal to Perform.—The unqualified refusal of a contractor, for a part of the work on a building in actual progress of erection, is in itself a breach of the contract. *Thompson v. Lanig*, 8 *Bosw.* 482.

29. Substitution of Work.—A building contract contained a provision that the owner, on fifteen days notice, might employ another to finish it, and pay therefor out of any money due the contractor. *Held*, that by failing to complete, the contractor forfeited only so much as owner was obliged to pay to finish the building. *Foley v. Gough*, 4 *E. D. Smith*, 724.

CHAPTER II.

ON CHARTER PARTIES.

No. 254.

i. Owner against Freighter, for not Loading.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant entered into an agreement, a copy of which is hereto annexed.

[*Or* I. That on the day of, 187., at, the plaintiff and defendant agreed by charter party, that the defendant should deliver to the plaintiff's ship "Flying Scud," at, on the day of, 187., four hundred and fifty tons of wheat, which she should carry to London, England, and there deliver, on payment of four thousand dollars freight; and that the defendant should have ten days for loading, five days for discharge, and three days for demurrage, if required, at fifty dollars per day.]

II. That at the time fixed by the said agreement, the plaintiff was ready and willing, and offered to receive the said merchandise [*or* the merchandise mentioned in the said agreement], from the defendant.

III. That the period allowed for loading and demurrage has elapsed, but the defendant has not delivered the said merchandise to the said vessel.

Wherefore the plaintiff demands judgment for dollars for demurrage, and dollars additional for damages.

[*Demand of Judgment.*]

1. Charter Party Defined.—A charter party is a contract, by which the owner lets his vessel to another, for freight. (*Spring v. Gray*, 6 *Pet.* 151, 164.) Any contract founded on an illegal voyage partakes of the character of that voyage, and stands or falls with it. *Colquhoun v. N.Y. Fireman's Ins. Co.*, 15 *Johns.* 352.

2. Damages.—The measure of damages against a charterer who refuses to furnish a cargo according to his contract, is the stipulated price, deducting the net earnings of the vessel during the time she has been occupied on the voyage, at an average passage, and including the lay days. (*Ashburner v. Balchen*, 7 *N.Y.* 262.) If the freighter only partially fulfills his contract, the owner may recover for the dead freight his contract price; but the owner is bound to take other freight if offered, though at a less price, and can recover only the difference in price. 12 *Wend.* 457; *Abb. on Shipping*, 428; *Heckscher v. McCrea*, 24 *Wend.* 304.

3. Demurrage, Allegation for.—That the defendant detained the ship days beyond the periods so agreed on for loading, discharging, demurrage, as aforesaid, whereby the plaintiff, during all that time, was deprived of the use of the ship, and incurred dollars expense in keeping the same and maintaining the crew thereof.

4. Demurrage, Damages for.—Although demurrage, properly so called, is only payable when it has been stipulated, yet if a vessel is improperly detained, the owner may have a special action for the damage. *Abb. on Shipping*, 304; 9 *Carr. & P.* 709; 10 *Mees. & W.* 498; 1 *Barn. & A.* 118; *Clendaniel v. Tuckerman*, 17 *Barb.* 184.

5. Demurrage, Liability for.—It is the duty of the charterer to restore the ship at the end of the period allowed for the demurrage,

but they are not responsible for an unreasonable delay by the master. (*Robbins v. Codman*, 4 *E. D. Smith*, 315.) One who purchases goods arriving in bond, is not liable for demurrage of the vessel, for detention occurring before the seller obtains a legal permit for the delivery. (*Gillespie v. Durand*, 3 *E. D. Smith*, 531.) No demurrage can be recovered by an owner for a detention occasioned either by the misconduct of the master, for which the owner alone was answerable, or to avoid danger, and not by any misconduct or any breach of covenant by the charterer. *Hooe v. Groverman*, 1 *Cranch*, 214.

6. Duties of Master.—Where a charter party allows a charterer a number of “lay days,” and neither the consignees nor other persons receive the cargo or pay the freight after arrival at the port of destination, the master acting as sole agent on behalf of both charterer and owner, is bound to sell the cargo, and pay the freight, on the expiration of the lay days, but he is not bound to sell before the expiration of the lay days. *Robbins v. Codman*, 4 *E. D. Smith*, 315.

7. Interpretation of Contract.—In the construction of charter parties, it must be remembered that they are often informal, and must have a liberal construction, in furtherance of the real intention of the parties and usage of the trade. (*Abb. on Shipping* (*Story's Ed.*) 188; *Kent Ch.* 47; 1 *Paine*, 358; 1 *Sumn.* 551; 2 *Id.* 589; 8 *Wheat.* 605, 634; *Raymond v. Tyson*, 17 *How. U.S.* 53.) And though the owner of a ship, of which the charterer is freighter only, has a lien upon the cargo for freight, and also for a sum agreed to be paid for the use and hire of the ship, his lien may be considered as waived, without express words to that effect, if there are stipulations in the charter party inconsistent with the exercise of the lien, or when it can fairly be inferred that the owner meant to trust to the personal responsibility of the charterer. (*Paine*, 363; 18 *Johns.* 157, 162; *Abb. on Shipping*, 178; 4 *Bing.* 729; 16 *Ves.* 275; 5 *Maule & S.* 180; 4 *Barn. & Ald.* 52; *Raymond v. Tyson*, 17 *How. U.S.* 53.) As to the construction of charter parties in peculiar cases, see *Ogden v. Parsons*, 37 *Hunt's Merchants' Mag.* (*Dec.* 1857) 710; *Belmont v. Tyson*, 36 *Id.* (*Feb.* 1857) 202; *Freeman v. A Cargo of Salt*, 40 *Id.* (*Apr.* 1859) 457.

8. Mode of Stowage.—Where no mode of stowage is prescribed in the charter party, the usage of trade will obtain, and the owner will not be liable for damages resulting therefrom. *Lamb v. Parkman*, *Sprague*, 343.

9. Lay Days.—Under a charter party, the lay days of a vessel, by the general rule, commence to run from the time the vessel enters the dock. (1 *Pars. Mar. L.* 262; *Rowe v. Smith*, 10 *Bosw.* 268.) Where the delivery, by the terms of the charter party, was to be made “alongside of the plaintiff’s vessel, within reach of her tackles.” *Held*, that if the master was directed to take the vessel to a certain dock, and did so, the lay days commenced to run from the day she was taken there, and was in readiness alongside the dock to receive her cargo. A charter party provided for “lay days” as follows: to load, twenty days from the 12th inst., the owner guaranteeing to have the vessel ready by that time; and by a subsequent stipulation the charter party was to commence when the vessel was to receive cargo, and notice thereof should be given to the charterer. The readiness of the vessel at the day named was a condition precedent to the charterer’s liability to accept and employ her, and the charter party commences on notice that vessel is ready to receive the cargo. *Weisser v. Maitland*, 3 *Sandf.* 318.

10. Liability of Charterer.—Where, by the terms of the charter party, the charterer was to return the boats “in as good condition as they now are, with the exception of the ordinary use and wear,” he is not liable as an insurer against the perils of the sea or risks of navigation. 17 *Mass* 501; *Story on Bailm.* § 35; *Brown’s Leg. Max.* 187; *Ames v. Belden*, 17 *Barb.* 514.

11. Owner for Voyage.—If, by the terms of the charter party, the charterers are to have exclusive possession, control, and management of the vessel, appoint master, run the vessel, and receive the entire profits, they are the owners, and are alone responsible for damages and contracts. (8 *Wheat.* 632; 8 *Cranch*, 39; *Abb. on S. (Eng. Ed.)* 57, Note 1; *Id.* 288–9; 1 *Sumn.* 566–7; 2 *Gall.* 75; *Hill v. The “Golden Gate,”* 1 *Newb.* 308; *Winter v. Simonton*, 3 *Cranch C. Ct.* 104.) A charter party examined, and held not to have had the effect of transferring the ownership and possession from the general owners. (*Clarkson v. Edes*, 4 *Cow.* 470; *Mactaggart v. Henry*, 3 *E. D. Smith*, 390; *Holmes v. Pavenstedt*, 5 *Sandf.* 97.) And the charterers’ right of possession may be lost by a voluntary surrender to the owners. *Bergen v. Tamined*, 40 *Hunt’s Merch. Mag.* 708.

12. Power of Master.—The master of the vessel may make a charter party, where the owner has no agent in a foreign port, for the benefit of the owner, but not to give a creditor of the owner a security of the debt due to him. *Hurry v. Hurry*, 2 *Wash. C. Ct.* 145.

13. Refusal to Overload.—Although the charter party lets the entire capacity of the vessel, if the goods put on board are heavy articles, and before the ship is full, sink her as low as is usual and proper without extra danger, the owners or master of the vessel do not, by refusal to take more, violate the charter party. *Weston v. Minot*, 3 *Woodb. & Mo.* 436.

14. Repairs of Vessel.—A breach of a clause in the charter party, binding the charterer to keep the vessel in repairs, should be alleged in the complaint in an action by owners of a vessel against charterer. *Coster v. N.Y. and Erie R.R. Co.*, 3 *Abb. Pr.* 332.

15. Rescission.—Two persons chartered a vessel for six months, and after a part of the time had passed, one agreed with the other, in writing, that the charter party was to be deemed to have expired. *Held*, a valid rescission of the contract. 14 *Johns.* 172, 300, 387; 3 *Id.* 70; 13 *Id.* 286; *Wheeler v. Cartis*, 11 *Wend.* 653.

16. Running Days.—A provision in the charter party for running days, is in effect a positive stipulation by the freighter that he will load and unload within the time mentioned, and inevitable accident does not excuse him. *Field v. Chase, Hill. & D. Supp.* 50.

No. 255.

ii. *Charterer against Owner, for Deviation from Contract, and Abandonment of Voyage.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant agreed, by charter party, that the defendant's ship called the, then at, should sail to, or so near there as she could safely get, with all convenient speed, and there load a full cargo of, or other lawful merchandise, from the factors of the plaintiff, and carry the same to, and there deliver the same, on payment of freight.

II. That the plaintiff duly performed all the conditions of the contract on his part.

III. That the said ship, the, did not with all convenient speed sail to, or so near thereto as she could safely get; but that the defendant caused the said ship to deviate from her said voyage and abandon the same, to the plaintiff's damage dollars.

[*Demand of Judgment.*]

17. Assent of Charterer.—Where a chartered vessel met another vessel in distress in the course of her voyage, and one of the charterers, being on board, consented that a part of the crew might go on board the distressed vessel, to assist in saving her, the assent of the charterer would not vary the contract respecting the freight. *Mason v. The "Blaireau," 2 Cranch, 240.*

18. Deviation.—On a voyage from South America to Boston, stopping at New York may be such a deviation as would render charterer liable for damage it might occasion. Yet it is not such a change as will dissolve the charter party, and entitle the owner to possession at New York, and to retain cargo for freight, though the charterer has become insolvent. *Lander v. Clark, 1 Hall, 355.*

19. Negative Allegations.—If there are exceptions in the charter party, allegations tending to negative the same are not necessary. *Wheeler v. Bavidge, 9 Exch. 668; S.C., Eng. Law & Eq. R. 541.*

No. 256.

iii. *Ship Owner against Charterer, for Freight.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, the plaintiff and defendant agreed, by charter-party, that the plaintiff's ship called, should

with all convenient speed sail to, and that the defendant should there load her with a full cargo of, or other lawful merchandise, to be carried to, and there delivered, on payment by the defendant to the plaintiff of freight, at dollars per ton.

II. That the said ship accordingly sailed to, aforesaid, and was there loaded by the defendant with a full cargo of lawful merchandise, and the plaintiff carried the said cargo in said ship to aforesaid, and there delivered the same to the defendant, and otherwise performed all the conditions of said contract on his part.

III. That said freight amounted in the whole to the sum of dollars.

IV. That defendant has not paid the same.

[*Demand of Judgment.*]

20. Allegation against Assignee of Cargo.—That, thereafter, the said A. B. assigned the cargo to the defendant, who thereupon became the owner thereof, and entitled to receive the same.

21. Allegation of a Charter.—The plaintiffs alleged in their complaint, that their assignors having chartered a vessel, earned freight, which the defendants, the consignees of the vessel, had collected and refused to pay over. The defendants, in their answer, denied that the plaintiff's assignors had chartered the vessel in any other way than by a charter party, which provided that their right to any share of the freight should be contingent on the freight exceeding \$25,000. *Held*, that this put in issue plaintiff's allegation of a charter, and that the plaintiffs must prove, either an unconditional charter, or that under the charter alleged by defendants the freight had exceeded \$25,000. *Patrick v. Metcalf*, 9 *Bosw.* 483.

22. Lien for Freight.—The right of lien for freight does not

absolutely depend on any covenant to pay freight on the delivery of the cargo. (*Abb. on Sh.* pt. 3, c. i. § 7, p. 177; *The "Volunteer,"* 1 *Sumn.* 551.) Nor can charterers, with the consent of the master abroad, make any agreement exonerating the goods from freight, and defeating the lien of the owners. (*Gracie v. Palmer*, 8 *Wheat.* 605; reversing 4 *Wash. C. Ct.* 110.) Nor can the master enter into such agreements, and such agreements would give no rights to a person who entered into them with the knowledge of the charter party. (The "Salem's" Cargo, *Sprague*, 389.) But the master, notwithstanding the interference of the charterer, may retain the goods until his lien shall be satisfied, or may sue the consignee after delivery of the goods. 4 *Wash. C. Ct.* 110; 1 *Paine*, 358; 1 *Sumn.* 551; 2 *Id.* 589; 8 *Wheat.* 39, 605; 3 *Kent* (3 *Ed.*) 138, 210, 220; *Abb. on Sh.* 286-8; *Smith Merc. Law*, 187; *Shaw v. Thompson, Olc.* 144.

23. Sale of Cargo.—Where owners of cargo did not appear, and the master put up at auction and sold the cargo on due notice, and became the purchaser, but retained the goods on the vessel awaiting a higher price, he had no right thus to constitute the ship a store house, and the charterer was not liable for demurrage, beyond a reasonable time for discharging after the first sale. *Robbins v. Codman*, 4 *E. D. Smith*, 315.

CHAPTER III.

COVENANTS.

No. 257.

i. *Warranty of Title to Real Property.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, in consideration of dollars to him paid, granted to the plaintiff, by deed, [*here insert description*], and in his said deed warranted

that he had good title in fee simple to the said property, and would defend the plaintiff in his possession of the same.

II. That the defendant was not, but one A. B. was then the lawful owner of the said lands, in fee simple.

III. That on the day of, 187., the said A. B. lawfully evicted the plaintiff from the same, and still withholds the possession thereof from him.

[*Demand of Judgment.*]

1. Assignment of Breach.—The covenant of quiet enjoyment, and of general warranty, require the breach to show an eviction. *Rechert v. Snyder*, 9 *Wend.* 416; *Marston v. Hobbs*, 2 *Mass.* 433; *Pollard v. Dwight*, 4 *Cranch*, 421.

2. Covenants, how Considered.—Covenants are to be considered dependent or independent, according to the intention of the parties, which is to be deduced from the whole instrument. (*Philadelphia R.R. Co. v. Howard*, 13 *How. U.S.* 307, 339.) Where covenants are dependent, an action cannot be maintained without showing a performance on plaintiff's part of every affirmative covenant. *Webster v. Warren*, 2 *Wash. C. Ct.* 456.

3. Covenant—what it Imports.—That a party covenanted by indenture imports that a covenant was under seal. (*Cabell v. Vaughan*, 1 *Saund.* 291; *Phillips v. Clift*, 4 *Hurlst & N.* 168;) and imports delivery. (*Tomkins v. Corwin*, 9 *Cow.* 255; *Cecil v. Butcher*, 2 *Jac. & W.* 571; *Brinckerhoff v. Lawrence*, 2 *Sandf. Ch.* 400.) "In writing" imports delivery. *Prindle v. Caruthers*, 15 *N.Y.* 425.

4. Eviction—Allegation of.—That the defendant has not warranted and defended the premises to the plaintiff; but, on the contrary, one C. D. lawfully claimed the same premises by a paramount title, and afterwards, in an action brought by him in the District Court of the Judicial District, held at the County of, State aforesaid, in which said C. D. was plaintiff, and this plaintiff was defendant, the said C. D. on the day of, 187., recovered judgment, which was duly given by said Court against this plaintiff, for his seizin

and possession of the premises, and on the day of, 187., lawfully entered the premises, and ousted the plaintiff therefrom, and still lawfully holds the plaintiff out of the possession thereof.

5. Eviction by Process of Law.—Eviction by process of law is necessary to enable an action to be maintained on the covenant. (*Norton v. Jackson*, 5 *Cal.* 262; *Fowler v. Smith*, 2 *Cal.* 44.) And an averment that the vendor had not a good and sufficient title to the said tract of land, and by reason thereof the said plaintiffs were ousted and dispossessed of the said premises by due course of law: *Held* sufficient. *Day v. Chism*, 10 *Wheat.* 449.

6. Eviction by Title Paramount.—In a declaration upon a covenant of warranty, it is necessary to allege substantially an eviction by title paramount; but no formal terms are prescribed in which the averment is to be made. *Rickert v. Snyder*, 9 *Wend.* 416; *Day v. Chism*, 10 *Wheat.* 449.

7. Eviction Necessary.—A purchaser in possession cannot reclaim the purchase money on account of defect in the title, unless he has been evicted or disturbed. (*Salmon v. Hoffman*, 2 *Cal.* 138; *Norton v. Jackson*, 5 *Cal.* 262.) Nor on the ground that the title existed elsewhere than in the grantor. *Fowler v. Smith*, 2 *Cal.* 44.

8. General Covenant of Warranty.—If a deed contains a general covenant of warranty of lands thereby intended to be conveyed, and also a covenant that if any portion of the land has been before conveyed to other persons, the grantor will convey to the grantee other lands of like quality, the former covenant relates to land which the deed purports to convey, and not to the land which the grantor covenanted to convey in the latter covenant. (*Vance v. Pena*, 33 *Cal.* 631.) Where land is sold with covenant of warranty, accompanied with delivery of possession, and the purchaser gave a note in payment, the warranty and the promise to pay are independent covenants. (*Norton v. Jackson*, 5 *Cal.* 262.) A covenant of the grantor, warranting the title of the land sold as "indisputable and satisfactory," is not broken if the title is good and valid. *Winter v. Stock*, 29 *Cal.* 407. •

9. Inducement.—Where matter in a deed is stated as inducement only, and the party suing is neither a party or privy to the deed, a *profert* is unnecessary. (*Duvall v. Craig*, 2 *Wheat.* 45.) Under the common law, it was sufficient in a declaration for a breach of a cove-

nant to state that the defendant conveyed to the plaintiff certain land or premises in the said deed particularly mentioned and specified, making *profert*, without any further description. 1 *Saund.* 233, n. 2; 2 *Chit. Pl.* 192, n. 1; *Dunham v. Pratt*, 14 *Johns.* 372.

10. Insufficient Averment.—That the plaintiff was lawfully evicted from the right and title to said premises by a paramount and lawful title to the same, does not import an ouster from possession, *Blydenburgh v. Cotheal*, 1 *Duer*, 176.

11. Judgment Covenants.—Where the parties to a deed covenanted severally against their own acts and incumbrances, and also to warrant and defend against their own acts and those of all other persons, with an indemnity in land of an equivalent value, in case of eviction: *Held*, that these covenants were independent, and that it was unnecessary to allege in the declaration any eviction, or any demand, and refusal to indemnify with other lands; but that it was sufficient to allege a prior incumbrance by the acts of the grantors, etc.; and that the action might be sustained on the first covenant for the recovery of pecuniary damages. *Duval v. Craig*, 2 *Wheat.* 45.

12. Liability.—The covenant of warranty runs with the land, and the vendor is liable directly to the person evicted. *Blackwell v. Atkinson*, 14 *Cal.* 470.

13. Limitation.—Where a covenant of warranty is based upon a right or title, which is subsequently by a judgment of the Court adjudged invalid, and five years are given by statute to appeal from said judgment, an action for breach of the covenant will not lie till the five years have expired. *Hills v. Sherwood*, 33 *Cal.* 474.

14. Non-Claim Covenant.—A covenant of non-claim in a deed amounts to a covenant of warranty, and operates equally as an estoppel. *Gee v. Moore*, 14 *Cal.* 472.

15. Notice of Action.—Verbal notice is sufficient. (See *Kelly v. Dutch Church of Schenectady*, 2 *Hill*, 105.) If the covenantor has notice of the action, the covenantee is not bound to defend. (*Jackson v. Marsh*, 5 *Wend.* 44.) The proceedings will be conclusive against the covenantor in this action. *Cooper v. Watson*, 10 *Id.* 202.

16. Possession.—Where the covenantee is held out of possession by one in actual possession under a paramount title, the covenant is broken. *Whity v. Hightower*, 12 *Smed. & M.* 478.

17. Remedy.—If a party takes a conveyance without covenants, he is without remedy in case of failure of title; and if he takes a conveyance with covenants, his remedy upon failure of title is confined to them. *Peabody v. Phelps*, 9 *Cal.* 213.

18. Right of Way.—The use of a right of way by the party entitled to it, is an eviction of the owner of the servient estate, within a covenant of warranty against "all lawful claims," for which the latter may sue as assignee of the covenantee. *Russ v. Steele*, 40 *W.* 310.

19. Special Damages—Allegation of.—That by reason thereof the plaintiff has not only lost said premises, but also the sum of dollars, by him laid out and expended in and upon the said premises, in repairing and improving the same, and also the sum of dollars costs and charges sustained by the said A. B. in prosecuting his action for the recovery thereof, and the sum of dollars, for his own costs, charges, and counsel-fees in defending said action.

No. 258.

ii. The Same, Another Form.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, by his deed of that date, duly executed, in consideration of dollars, sold and conveyed, in fee simple, to the plaintiff, certain land [*describe it*].

II. That the defendant, by the same deed, covenanted as follows: [*Copy the covenant.*]

III. That the defendant had not, at the time of the execution of said deed, a good and sufficient title to said premises; and by reason thereof, on the day of, 187., at, the plaintiff was ousted and dispossessed of the said premises by due course of law.

[*Or* III. That one G. H., at the time of the execu-

tion of the said deed and from thence, had lawful right and paramount title to the said premises, and by virtue thereof, after the execution of said deed, on the day of, 187., entered upon the possession thereof, and ousted and dispossessed by due process of law, and kept and still keeps the plaintiff from the possession of the same. That the plaintiff has also been compelled to pay the costs and charges sustained by the said G. H. in prosecuting a certain action in the Court, in the County, for the recovery of said premises, which amounted to dollars, and to pay out the additional sum of dollars in endeavoring to defend such action.

[*Demand of Judgment.*]

No. 259.

iii. *By Assignee of Grantee, against Previous Grantor.*

[TITLE.]

The plaintiff complains, and alleges:

I. [*Allege sale to one C. D.*]

II. [*Allege and set out copy of covenant.*]

III. That the said C. D. afterwards, on the day of, 187., at, by deed duly executed, in consideration of the sum of dollars, conveyed the said premises to one E. F., his heirs and assigns; and the said E. F. afterwards, on the day of, 187., at, by his deed of that date, duly executed, in consideration of the sum of dollars, conveyed the same premises to the plaintiff.

IV. That the plaintiff afterwards, on the day of, 187., at, entered into and was possessed of said premises.

V. That the defendant had not at the time of the execution of his said deed, nor has he since had a good and sufficient title to the said premises; by reason whereof, the plaintiff was afterwards, on the day of, 187., ousted and dispossessed of the said premises by due course of law.

[*Demand of Judgment.*]

No. 260.

iv. *By Heirs of Covenantee, against Previous Grantor.*

[TITLE.]

The plaintiff complains, and alleges:

I. [*Allege sale as in preceding forms.*]

II. [*Allege and set out copy of covenant.*]

III. That the said C. D., afterwards, and on the same day, entered into and was possessed of said premises, and afterwards, on the day of, 187., at, said C. D. died, whereupon the said premises, and his estate therein, descended to the plaintiffs, as children and co-heirs of the said C. D., deceased; and that they afterwards, on the same day, entered into and were possessed of said premises, until ousted and dispossessed, as hereafter mentioned.

[*Here set forth the breach, etc., as in the preceding forms.*]

[*Demand of Judgment.*]

No. 261.

v. *By Devisee of Covenantee, against Previous Grantor.*

[TITLE.]

The plaintiff complains, and alleges:

I. and II. [*Allege sale and covenant.*]

III. That the said E. F., afterwards, and on the same day, entered into and was possessed of said premises; and afterwards, on the day of, 187., at, made his last will and testament, in writing, and thereby, amongst other things, devised the said premises to the plaintiff; and afterwards, on the day of, 187., at, the said E. F. died, leaving such will.

IV. That on the day of, 187., the said will was proved and admitted to probate in the Probate Court of, etc., and by order of said Court, letters testamentary were issued. [*If the property is situated in a county other than the one where the will was admitted to probate, add: That afterwards, on the day of, 187., by an order of the Probate Court of County [where the premises are situated], an authenticated copy of said will, from the record aforesaid, with a copy of said order of probate annexed thereto, was filed of record in the Probate Court of said County of [where premises lie], and duly recorded.*]

V. That thereupon the plaintiff entered into possession of the said premises, and was possessed thereof until ousted and dispossessed as hereafter mentioned.

[*Set forth breach, etc., as in preceding forms.*]

[*Demand of Judgment.*]

*No. 262.**vi. Warranty as to Quantity.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant warranted a certain farm in Township, County, State of, to contain acres of land, and thereby induced the plaintiff to purchase the same from him, and to pay him dollars therefor.

II. That the said farm contained only acres, instead of acres, the quantity sold to plaintiff by defendant.

III. That plaintiff was damaged thereby in the amount of dollars.

[*Demand of Judgment.*]*No. 263.**i. On Covenant against Incumbrances on Real Property.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, in consideration of dollars to him paid, granted to the plaintiff, by deed, in fee simple, a farm in the Town of, County of [*or otherwise briefly designate the property*].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [*Copy of covenant.*]

III. That at the time of the making and delivery of said deed the premises were not free from all incumbrance, but on the contrary, the defendant before that time, on the day of, 187., at, by deed in the nature of a mortgage, duly executed, had mortgaged the said premises to one R. S., to secure the payment of dollars, with interest.

IV. And for a further breach, the plaintiff alleges, that on the day of, 187., in the Court, of the Judicial District, of County, in this State, judgment was rendered against the defendant for the sum of dollars, in an action in which the said [*incumbrancer*] was plaintiff, and the defendant herein was defendant, which judgment was on the day of, 187., docketed in said County of [*where premises are situated*], and which judgment, at the time of the execution and delivery of the deed in the nature of a mortgage, remained unpaid and unsatisfied of record.

V. And for a further breach, the plaintiff alleges, that at the time of the execution and delivery of said deed the premises were subject to a tax theretofore duly assessed, charged, and levied upon the said premises by the said City of, and the officers thereof, of the sum of dollars, and which tax was then remaining due and unpaid, and was at the time of the delivery of said deed a lien and incumbrance by law upon the said premises.

VI. That by reason thereof, the plaintiff paid, on the day of, 187., the sum of dollars in extinguishing the [*here state what, whether the judgment, lien, tax, or other incumbrance, or all of them*] aforesaid, to his damage dollars.

[*Demand of Judgment.*]

20. Assignment of Breach.—A breach of covenant is sufficiently assigned by negating the words of the covenant. (*McGeehan v. McLaughlin*, 1 *Hall*, 33.) If the special facts to negative a covenant are necessarily included in the general averment of the breach, a distinct and substantive averment of them is not necessary. (*Randall v. C. and D. Canal Co.*, 1 *Harr.* 151; 3 *Bibb*, 330; *Hard v. Trimble*, 3 *Marsh*, 533; 14 *J. Rep.* 248; 11 *Id.* 6.) A general covenant against incumbrances is broken by the existence of an incumbrance at the making of the deed. The breach must set out the particular incumbrance relied on. *Shelton v. Pease*, 10 *Mo.* 473; *Juliand v. Burgott*, 11 *Johns.* 6; *Thomas v. Van Ness*, 4 *Wend.* 549; compare *People v. Russell*, *Id.* 570.

21. Condition Precedent.—Where a deed contains a covenant, that in case the grantees shall pay a certain sum of money before a certain day, "then this instrument is to take effect as a full and complete conveyance in fee of all, etc., take the estate belonging to the covenantor," etc., the payment of the purchase money was a condition precedent to vesting the estate. *Mesick v. Sunderland*, 6 *Cal.* 297.

22. Covenant in Mortgage.—If the mortgage covenants to pay and discharge all legal mortgages and incumbrances, the covenant will make the mortgagor personally liable for the sum due and secured by an executory contract, for a mortgage not under seal or recorded, if the mortgagor had actual notice of it, and the mortgage will become security for the performance of the covenant. (*Racouillat v. Sansevain*, 32 *Cal.* 376.) It does not put the purchaser from the mortgagor upon any inquiry as to any mortgages or incumbrances not of record. *Racouillat v. Rene*, 32 *Cal.* 450.

23. Damages Sustained.—A party having been defeated in a suit against him for damages for having interfered with an easement on his land, may recover of his warrantor the damage he has sustained in consequence of the breach of the covenant against incumbrances, and such costs and expenses as he has fairly and in good faith incurred in attempting to maintain and defend his title. (*Smith v. Sprague*, 40 *W.*) He was not bound to follow the advice of his warrantor, by suing the party who claimed the easement and entered upon the premises. (*Id.*) "There is," says Lord Mansfield, in *Lowe v. Peers*, "a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election: he may either bring an action of *debt*, and recover the penalty, after

which recovery of the penalty he cannot resort to the covenant; or, if he does not choose to go for the penalty, he can proceed upon the covenant, and recover more or less than the penalty *toties quoties*." (*Ledg. on Dam.* 424; see 4 *Burr.* 2, 225; also *Bird v. Randall*, 1 *W. Black.* 373, 387; *Winter v. Trimmer*, 1 *W. Black.* 395; *Harrison v. Wright*, 13 *East.* 343.) The use and meaning of the terms "penalty" and "liquidated damages" in agreements, commented on, in *People v. Love*, 19 *Cal.* 676.

24. Description of Land Conveyed.—A brief description will be sufficient with *profert* of conveyance. 1 *Saund.* 233, n. 2; 2 *Chitt. Pl.* 192, n. i; *Dunham v. Pratt*, 14 *Johns.* 372.

25. Estoppel.—One who has covenanted with executors, as such, that third persons should satisfy and discharge a mortgage, is thereby estopped from denying the right of executors to sue on such covenant in their representative capacity. (*Farnham v. Mallory*, 5 *Abb. Pr.* (N.S.) 380.) But a subsequent grantee may maintain an action against the grantor on a covenant. *Colby v. Osgood*, 29 *Barb.* 339.

26. Judgment Liens.—That certain persons recovered judgment against the owner, which were liens and incumbrances, is sufficient, without stating the fact of docketing said judgment, or its legal effect. (*Cady v. Allen*, 22 *Barb.* 388; see, also, *Chamberlain v. Gorham*, 20 *Johns.* 746; reversing S.C., *Id.* 144.) A covenant that the whole amount of a judgment is due, is not to be construed to mean that no one of the judgment-debtors has been released. *Bennett v. Buchan*, 5 *Abb. Pr.* (N.S.) 412.

27. Legal Effect.—When an action is brought on the breach of a covenant in the contract, it is enough to allege the conveyance according to its legal effect, showing a consideration for the covenant, and then set forth a copy of the covenant; (*Swan on Pl.* 198;) thus combining the two systems of pleading for the sake of brevity. This method will be desirable when the contract is of great length. So, in a covenant to pay certain accounts, it is not necessary to set out the accounts so paid, thereby producing great prolixity. *Jones v. Hurlbaugh*, 5 *N.Y. Leg. Obs.* 19.

28. Payment.—Without the averment of payment of the incumbrance, plaintiff can recover only nominal damages. (*Delavergne v. Norris*, 7 *Johns.* 358; *Hall v. Dean*, 13 *Id.* 105; *Stanard v. Eldridge*,

16 *Id.* 254.) Except in the case of a covenantee who bought for the purpose of a re-sale, with notice to the covenantor at the time of sale. (*Bachelor v. Sturgis*, 3 *Cush.* 201.) In such a case those facts, and the diminution in value of the estate, and the expenditure in paying off the incumbrance, should be alleged, the latter as a special averment of damage. *De Forest v. Leete*, 16 *Johns.* 122.

29. Purchase after Breach.—A purchaser of a mill, after breach of covenant by a railroad company, with its former owner, to dig a new channel, etc., for the mill stream, cannot sue on said covenant. (*Junction R.R. Co. v. Sayers*, 28 *Ind.* 318.) Defendant made a valid agreement with three partners not to do business in a certain place. Two of said partners sold out to a third, and left said place. The third re-sold to defendant, and released said agreement. *Held*, that the other two partners could not sue for a breach, as the agreement was incident only to the business. *Gompers v. Rochester*, 56 *Penn. St.* 194.

30. Sufficient Averments.—Where a complaint avers a sale and conveyance, the existence of the mortgage, the execution of the bond, the failure of the defendant to comply with its conditions, and consequent sale of the premises under the mortgage, and their loss to the plaintiff, it was held sufficient on demurrer. (*McCarty v. Beach*, 10 *Cal.* 461.) And consideration need not be alleged, as in pleading on a sealed instrument the seal imports consideration. See *Ante.* p. 538, Note 5.

31. To what Covenant Attaches.—Every covenant relating to the thing demised attaches to the land, and runs with it. (*Laffan v. Naglee*, 9 *Cal.* 662.) But where the warranty in a deed contains a covenant to "warrant and defend the premises conveyed, from and against all or any incumbrances, claims, or demands, created, made, or suffered, by, through, or under him, and against none other," the warranty in the deed attaches itself to the interest conveyed, and not to the land itself. *Kimball v. Semple*, 25 *Cal.* 440.

No. 264.

ii. *The Same, where the Deed Expressed a Specific Incumbrance.*

[TITLE.]

The plaintiff complains, and alleges :

I. [*As in preceding form.*]

II. That by said deed the premises conveyed were described as being subject, nevertheless, to the payment of a certain mortgage recorded in the Recorder's Office at, on the day of, 187., in Book A. of mortgages, [*or other incumbrance, describing it*], and no other incumbrances were mentioned or specified in said deed, as existing upon, or affecting, said premises or the title thereto.

III. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [*Copy covenant*].

IV. That at the time of the making and delivery of the said deed, the premises were not free from all incumbrances other than the mortgage therein excepted, but on the contrary [*here set out any or all other incumbrances as breaches, and conclude as in preceding form*].

[*Demand of Judgment.*]

32. Implied Covenant.—Where a deed containing the words, “grant, bargain, and sell,” recites a mortgage existing at the time of the conveyance, with a warranty against the same, the general covenant implied by the words, “grant, bargain, and sell,” is restrained by the special covenant; (*Shelton v. Pease*, 10 Mo. 473;) and the special covenant is not a covenant to pay the mortgage.

33. Mortgage.—When premises are described in the granting

part of a deed as subject to a mortgage, such mortgage will not be in the covenant against incumbrances. (*Freeman v. Foster*, 55 *Mo.* 508.) A covenant by a vendor of real estate, that neither he nor his assigns will sell any marl from the adjoining premises, will not be enforced in equity against the alienee of the land intended to be burdened with the covenant. *Brewn v. Marshall*, 4 *C. E. Green*, 537.

No. 265.

i. *On a Covenant of Seizin, or of Power to Convey.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the defendant, for a valuable consideration, by deed, conveyed to the plaintiff in fee simple [*describe the property*].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [*Copy of covenant.*]

III. That at the time of the execution and delivery of said deed, the defendant was not the true, lawful, and rightful owner, and had not in himself at said time good right, full power, etc. [*negative the words of the covenant.*]

IV. Whereby the plaintiff has sustained damage in the sum of dollars.

[*Demand of Judgment.*]

34. Covenants not Implied.—Where there are no covenants of seizin, etc., in the deed, the law will not imply other covenants than those for quiet possession. *Fowler v. Smith*, 2 *Cal.* 39.

• **35. Eviction.**—As to necessity of stating an eviction in an action

on a covenant of seizin, see (*Pollard v. Dwight*, 4 *Cranch*, 420; *Duvall v. Craig*, 2 *Wheat.* 45; *Le Roy v. Beard*, 8 *How. U.S.* 451.) In Missouri, it seems it is not necessary to show an eviction. It is sufficient if some damage resulting from an outstanding paramount title be shown. *Dickson v. Desire*, 23 *Mo.* 157; see *Ante*, Note 6.

36. Breach and Eviction must be Alleged.—An action cannot be maintained on a covenant of seizin, unless a breach and an eviction be alleged. (*Robinson v. Neil*, 3 *Ohio*, 525; *King v. Kerr's Adm'r*, 5 *Ohio*, 154.) When there has not been an eviction, something equivalent must be averred. *Id.*

37. Damages, Measure of.—Where the grantor, in a deed containing a covenant of seizin, has no title to the land, the covenant is broken the instant it is made. And the criterion of damages is the purchase money with interest. (*Tapley v. Labeaume*, 1 *Mo.* 550.) Such a covenant is an assurance to the purchaser that the grantor has the estate both in quantity and quality. (*Pecare v. Chouteau*, 13 *Mo.* 527.) But where the vendor was actually seized, but of a defeasible estate, the damages should be merely nominal until the estate has been actually defeated. *Reese v. Smith*, 12 *Mo.* 344; *Bircher v. Watkins*, 13 *Mo.* 521; *Mosely v. Hunter*, 15 *Mo.* 322.

38. Death of Covenantor.—Where the covenantor dies before the discovery of the defect of title, and his personal representatives procure a good title, and tender a deed to the covenantee, a court of equity will compel him to accept such conveyance, and enjoin a judgment at law for a breach of the covenant. *Reese v. Smith*, 12 *Mo.* 344.

39. Essential Averments.—In an action of covenant, it must appear in the complaint with whom the covenant was made, the performance or readiness to perform, or the excuse for non-performance of a condition precedent, at the place and within the time specified. *Tate v. Barcroft*, 1 *Mo.* 163; *Keatley v. McLaugherty*, 4 *Id.* 221.

40. Implied Covenants.—A deed containing the words "grant, bargain, sell, and enfeoff," is operative as a deed of feoffment, and *livery of seizin* is not necessary. (*Perry v. Price*, 1 *Mo.* 553.) And under the statute of Missouri, it was held that they are separate and independent of each other. (*Alexander v. Schreiber*, 10 *Mo.* 460.) In Illinois, the words "grant, bargain, and sell," express covenants that the grantor is seized of an indefeasible estate, in fee simple, free from incumbrances

done or suffered by the grantor, as also for quiet enjoyment against the grantor, his heirs and assigns. (*Mosely v. Hunter*, 15 *Mo.* 322.) It embraces such incumbrances only as the vendor has control of, and not an outstanding mortgage created by his grantor. *Armstrong v. Darby*, 26 *Mo.* 517.

41. Negative the Words of the Covenant.—It is sufficient to negative the words of the covenant. (4 *Kenl's Com.* 479; *Rickert v. Snyder*, 9 *Wend.* 416.) It is not necessary that a breach of a covenant should be assigned in the very words of the covenant. It is sufficient to aver what is substantially a breach. *Fletcher v. Peck*, 6 *Cranch*, 87.

No. 266.

i. Grantee's Covenant to Build.

[TITLE.]

The plaintiff complains, and alleges :

I. That in consideration that the plaintiff would sell and convey to the defendant a lot of land [*describe it*], for the sum of dollars, the defendant, on the day of, 187., agreed that he would erect upon the premises a good brick house, to be occupied as a dwelling, and that he would not erect upon the premises any building that would be a nuisance to the vicinity of the premises.

II. That the plaintiff did accordingly sell and convey to the defendant said premises for said sum, but the defendant has not erected a good brick house on the lot, to be occupied as a dwelling; but, on the contrary, has erected upon said premises a wooden building, to be used as a slaughter-house.

III. That the defendant thereby has prevented other lots in the vicinity, owned by the plaintiff, from becoming valuable to the plaintiff, as they would otherwise

have become, and has injuriously affected their condition, and hindered the plaintiff from selling them; to his damage dollars.

[*Demand of Judgment.*]

42. Covenant to Build Party Wall.—A covenant between A. and B., owners of adjoining premises, that A. may build a party wall, half on each lot, and that when B. uses the same he shall pay half its cost, is personal, and does not pass with the land to A's grantee. *Block v. Isham*, 28 *Ind.* 37.

43. Covenant to Remove Buildings.—A covenant entered into between owners of adjoining city lots, for themselves and all claiming under them, to the effect that all buildings erected on such lots shall be set back a specified distance from the line of the street on which the lots front, is a covenant which equity will enforce between the parties to it, in favor of one against the other, or in favor of one against any subsequent grantee of either lot. *Roberts v. Levy*, 3 *Abb. Pr. (N.S.)* 311.

44. Special Damages.—In such an action special damages must be alleged. *Bogert v. Burkhalter*, 2 *Barb.* 525.

45. Stipulation to Build.—Where the lessee stipulated to build a wharf, but specified no particular time, the lessor, before the expiration of the term, could have no legitimate cause of complaint. (*Chipman v. Emeric*, 5 *Cal.* 49.) If the lessee covenants to build on the demised premises within a given time, the covenant is not a continuing covenant, and if he fails to build, the receipt of rent by the lessor accruing after the end of the time given is a waiver of the forfeiture. *McGlynn v. Moore*, 25 *Cal.* 384.

46. Removal of Buildings.—Where the lessee stipulates to surrender the premises at the end of the term, "reasonable use and wear thereof, and damages by the elements excepted," it does not authorize the tenant to remove buildings erected by him on the lot, even if there be evidence of an oral agreement to that effect. *Jungerman v. Bovee*, 19 *Cal.* 354.

No. 267.

ii. *On Covenant against Nuisances—By Grantor against Grantee.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of, 187., at, the plaintiff, by his deed, conveyed to the defendant, for a valuable consideration, as well as in consideration of the covenant hereafter mentioned, a lot of land.

II. That said deed contained a covenant on the part of the defendant, the grantee therein, of which the following is a copy: [*Copy of covenant against nuisances.*]

III. That said deed was delivered by the plaintiff, and by the defendant duly accepted.

IV. That the defendant has erected, and suffered and permitted to be erected, on said premises, a building occupied and used as a slaughter-house.

V. That the offal and blood in and carried out from said slaughter-house, and the offensive smell created thereby, is a nuisance to the vicinity of the said premises and to the plaintiff, whose house is adjoining; to his damage dollars.

[*Demand of Judgment.*]

47. Alleged Nuisance.—In such an action, it must be shown what the alleged nuisance is, and how it has injured the complainant. *Bogert v. Burkhalter*, 2 *Barb.* 525.

*No. 268.*iii. *On a Continuing Covenant to Maintain a Fence.*

[TITLE.]

• The plaintiff complains, and alleges:

I. That on the day of, 187., the plaintiff and defendant then were the owners of lands adjoining, and then made an agreement in writing, under their hands and seals, of which the following is a copy: [*Copy agreement.*]

II. That the plaintiff has duly performed all the conditions thereof on his part.

III. That the defendant did not, after the erection of said fence, maintain the same and keep it in continual repair, but, on the contrary, in the month of, 187., he suffered the same to become dilapidated and broken down, and to remain in that condition from that time until the day of, 187..

IV. That by means thereof the plaintiff suffered great damage by the injury to his lands and crops thereon, and his garden and fruit trees, by cattle coming through said dilapidated fence from the defendant's land upon the plaintiff's premises, and that plaintiff was compelled to repair and rebuild said fence, in order to protect his land from the damage caused by said cattle; to the damage of the plaintiff dollars.

[*Demand of Judgment.*]

48. Damages on Former Suit.—Where damages have been recovered in a former action on the same cause, it is proper to allege

that fact, and that damages now sued for accrued since the commencement of the former action. *Beckinth v. Griswold*, 29 *Barb.* 291.

49. Special Damages.—As to the right to recover damages for resulting injury and for necessary repairs combined, see *Beach v. Crain*, 2 *Comst.* 86.

No. 269.

iv. *Lessor against Lessee, on Covenant to Keep Premises in Repair.*

[TITLE]

The plaintiff complains, and alleges:

I. That on the day of, 187., by a lease in writing under their hands and seals, the plaintiff leased to the defendant, and the defendant rented from the plaintiff, for one year from said date, at a monthly rent of, a certain dwelling house in, in the County of, the property of the plaintiff.

II. That said lease contained a covenant on the part of the defendant, of which the following is a copy: [*Copy of the covenant.*]

III. That the defendant entered upon the premises and occupied the same during the said term of one year, under said agreement; but that he has failed to keep the said house and premises in good repair; but, on the contrary [*state injuries to premises*], and the house and premises otherwise injured by reason of the neglect of the defendant to keep them in good repair; to the damage of the plaintiff dollars.

[*Demand of Judgment.*]

50. Assigning Breach.—In a declaration upon an agreement, by which the lessor stipulated to let a farm, from January 1, 1820; to remove

the former tenants; and that the lessor should have the tenancy and occupation of the farm from that day, free from all hindrance; the assignment of the breach was, that, although specially requested on January 1st, the defendant refused and neglected to turn out the former tenant, who was then, or had been, in the possession and occupancy of the land, and to deliver possession thereof to the plaintiff. *Held* sufficient. (*Carroll v. Peake*, 1 *Pet.* 18.) To aver plaintiff's readiness and offer, as made on the first day of January, was sufficient. They need not be averred to have been made at the last convenient hour on the day. Nor need they be averred to have been made on the land. *Id.*

51. Copy of Covenant.—The entire lease need not be set out, only such covenants as relate to the breaches assigned. (*Sandford v. Halsey*, 2 *Den.* 235.) But where the breach assigned relates to a violation of the obligation arising out of the relation of landlord and tenant, state the hiring, and set out a copy of the lease. The facts out of which the duty or obligation arose ought to be stated. *City of Buffalo v. Holloway*, 7 *N.Y.* 493; *S.C.*, 14 *Barb.* 101; *Congreve v. Morgan*, 4 *Duer*, 439; *Seymour v. Maddox*, 16 *Q. B.* 326; *S.C.*, 71 *Eng. Com. L. R.* 326.

52. Covenants in Leases.—A covenant in a lease to be renewed indefinitely, is in effect the creation of a perpetuity, and is against the policy of law. (*Morrison v. Rossignol*, 5 *Cal.* 64.) Where a lease contains a covenant against assignment, and the restriction is once removed, it operates as a removal forever. (*Chipman v. Emeric*, 5 *Cal.* 49.) A covenant that if the lessor shall sell or dispose of the demised premises, the lessee is to be entitled to the refusal of the same, is a covenant running with the land. (*Laffan v. Naglee*, 9 *Cal.* 662.) A description in a lease as "a certain lot of land, etc., together with the improvements thereon, consisting of the dwelling known as the Hotel de France," is not an implied guaranty that the hotel shall remain on the lot during the term. *Branger v. Manciet*, 30 *Cal.* 624.

53. Damages by the Elements.—Those acts are to be regarded as the acts of God which do not happen through human agency, such as storms, lightnings, and tempests. (*Polack v. Pioche*, 35 *Cal.* 416.) Damages "by the elements," are damages by the act of God. *Id.*

54. Exceptions in Covenant to Repair.—In an action on a covenant in a lease to repair, followed by an exception in a distinct

clause, the complaint need not notice the exception. *Trustees of New Castle Common v. Stevenson*, 1 *Houst. (Del.)* 451.

55. Forfeiture.—If the landlord, after default, accepts the rent, he thereby waives the forfeiture, and cannot afterwards insist upon it, and much less can the tenant be allowed to say that he is discharged from his covenants by his own default in the payment of rent. (*Belloc v. Davis*, *Cal. Sup. Ct., Jul. T.*, 1869; see, also, "*Landlord and Tenant*.") In relation to leases for years, as well as those for life, the happening of the cause of forfeiture only renders the lease void as to the lessee. It may be affirmed as to the lessor, and then the rights and obligations of both parties continue without regard to the forfeiture. (*Clarke v. Jones*, 1 *Den.* 519; *Reade v. Farr*, 6 *M. & S.* 125; *Belloc v. Davis*, *Cal. Sup. Ct., July T.*, 1869.) The tenant cannot insist that his own act amounted to a forfeiture. If he could, the consequences would be, that in every instance of an action on the covenant for rent, brought on a covenant with a proviso of forfeiture for non-performance, the landlord would be defeated by the tenant showing his own default at aprior period. (*Doe dem. Bryan v. Banks*, 4 *Barn & Ald.* 409; cited in *Belloc v. Davis*, *Cal. Sup. Ct., July T.*, 1869; referring also to *Stuyvesant v. Davis*, 9 *Paige*, 427; *Canfield v. Westcott*, 5 *Cowes.* 270; and *Williams v. Talbott*, 15 *Tex.* 1; and the distinction drawn between these cases and the case of *Hemp v. Garland*, 4 *Q. B.* 519; 3 *Gale & Davidson*, 402; 45 *Eng. Com. Law R.* 519.) See *Ante*, p. 514, Note 3; see, also, Vol. ii. "*Landlord and Tenant*."

56. Interpretation of Covenants.—A covenant to pay rent quarterly is not a debt until it becomes due; for before that time the lessee may quit with the consent of the lessor, or he may assign his term with his consent, or he may be evicted by a title paramount to that of the lessor. (*Wood v. Partridge*, 11 *Mass.* 488; cited in *People v. Arguello*, *Cal. Sup. Ct., Jul. T.*, 1869.) A clause in a lease exempting the tenant from liability to restore house in case of fire, does not relieve from rent in case of such destruction. *Beach v. Farish*, 4 *Cal.* 339.

57. Lease as Evidence.—In California, leases for more than one year must be in writing, under seal, but for a less term a verbal lease is sufficient. (*Gen. Laws of Cal.* 91, 3,152.) In New York, the plaintiff may introduce in evidence a lease not under seal, to prove that the relation of landlord and tenant existed, and what was the rent agreed upon. *Williams v. Sherman*, 7 *Wend.* 109; *Wood v. Wilcox*, 1 *Den.*

58. Under-Lease.—One who takes an under-lease is bound by all the covenants in the original lease. (*Fielden v. Slater*, *L. R.* 7 *Eq.* 523.) So, the sale of spirits in bottles by a grocer, is a breach of a covenant that premises shall not be used “as an inn, public house, or tap-room, or for the sale of spirituous liquors. (*Id.*) An under-lease of a whole term amounts to an assignment. *Beardman v. Wilson*, *Law. Rep.* 4 *C. P.* 57.

59. Void Lease.—A lease for two years, executed by the lessees, and by an agent of the lessors, but who had no written authority to do so, is void. (*Folsom v. Perrin*, 2 *Cal.* 603.) Where a clause of renewal in a lease discloses no certain basis for ascertaining the rent to be paid, such clause is void for uncertainty. (*Morrison v. Rossignol*, 5 *Cal.* 64.) So, a covenant “to let the lessor have what land he and his brothers might want for cultivation,” is void for uncertainty. *Chipman v. Emeric*, 5 *Cal.* 49.

No. 270.

v. Lessee against Lessor, for not Keeping Premises in Repair.

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of , 187., by a lease made between the plaintiff and the defendant, under their hands and seals, the defendant leased to the plaintiff, and the plaintiff rented from the defendant, the premises known as No. Street, in , for months from that date, at the monthly rent of dollars.

II. That said lease contained a covenant on the part of defendant, of which the following is a copy: [*Copy of covenant to keep in repair.*]

III. That the plaintiff entered into possession of said premises under said lease, and used the same as a warehouse for storing various articles of merchandise.

IV. That the defendant has failed to keep the premises in repair, and has allowed [*state neglect and special damage caused thereby*], to the damage of the plaintiff
 dollars.

[*Demand of Judgment.*]

60. General Covenant to Repair.—If the embankment of a natural reservoir, which is filled with water by unusual rain, is broken by a stranger, so that the demised premises are injured by the water, the injury is not the act of God or of the elements, and the tenant is bound to repair, even if damages by the elements or acts of Providence are excepted from his covenant. (*Polack v. Pioche*, 35 *Cal.* 416.) A general covenant to repair is binding upon the tenant under all circumstances, even if the injury is from the act of God or a stranger. *Polack v. Pioche*, 35 *Cal.* 416.

61. Implied Obligation.—Defendant entered upon, occupied, and paid rent for premises under a demise for a term of years, made on behalf of a corporation, the owners, but not sealed with the corporate seal. By this agreement defendant undertook to make certain repairs. *Held*, that he was bound by his stipulation. He had become tenant from year to year, on the terms of the demise applicable to such a tenancy. *Ecclesiastical Commissioners v. Merral L. R.*, 4 *Exch.* 162.

62. Joint Lessors.—Where a lease was made by several owners of a house, reserving rent to each one in proportion to his interest, and there was a covenant on the part of the lessee that he would keep the premises in good repair, and surrender them in like repair, this covenant was joint as respects the lessors, and one of them (or two representing one interest) cannot maintain an action for the breach of it by the lessee. *Calvert v. Bradley*, 16 *How. U.S.* 580.

No. 271.

vi. *Lessee against Lessor, for not Completing Building according to Agreement.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiffs, under the firm name of A. B. & Co., and the defendants, under the firm name of C. D. & Co., entered into an agreement in writing, of which agreement the following is a copy: [*Copy agreement to complete unfinished store, similar to adjoining store.*]

II. That after the making of said agreement, and on the day of, 187., the defendants delivered, and the plaintiffs took possession of said building, under and in pursuance of said agreement, and upon the faith and assurance of the defendants, and the full belief thereof, that the said premises were finished in the same manner as the adjoining store, and in accordance with the terms of said agreement.

III. That the said premises were not finished in the same manner as the store adjoining at the time of making such agreement, but, on the contrary, [*allege specifically the difference*].

IV. [*Allege special damages*], to the damage of the plaintiff dollars.

[*Demand of Judgment.*]

*No. 272.*vii. *For Breach of Covenant of Quiet Enjoyment—Against Landlord.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, by deed [*or* lease under seal], let to the plaintiff, and the plaintiff rented from the defendant, the house numbered, Street,, for the term of three years, covenanting that the plaintiff should quietly enjoy possession thereof for the said term.

II. That on, etc., one A. B., who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

III. That the plaintiff was thereby prevented from continuing the business of [merchandising] at the said place, and was compelled to expend dollars in moving, and lost the custom of C. D., E. F., and G. H., and divers other persons, by such removal.

[Demand of Judgment.]

63. Covenant Defined.—The breach of the covenant for quiet enjoyment is an actual disturbance of possession by reason of some adverse right existing at the time of the making the covenant. (2 *Greenl. on Ev.* 239.) Not a tortious disturbance, nor a lawful disturbance by an adverse right subsequently acquired. (*Greenby v. Wilcocks*, 2 *Johns.* 1; *Grannis v. Clark*, 8 *Cow.* 36.) As to an entry by the landlord, see *Sedgwick v. Hollenback*, 7 *Johns.* 376.

64. Necessary Averments.—The complaint must state the

particulars as to the person or persons who prevented him, and by what right, and show a title at or before the date of the lease declared on. *Grannis v. Clark*, 8 *Cow.* 36.

65. Responsibility of Landlord.—Upon a covenant in a lease for quiet enjoyment, the lessor is responsible only for his own acts and those of others claiming by title paramount to the lease. (*Playter v. Cunningham*, 21 *Cal.* 229.) In such a covenant, no set formula is required. Any language which expresses the intent is sufficient. *Levitzky v. Canning*, 33 *Cal.* 299.

CHAPTER IV.

EMPLOYMENT.

No. 273.

i. For Breach of Contract to Employ.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant], and that the defendant should employ the plaintiff as such, for the term of [one year, *or as the case may be*], and pay him for his services dollars monthly [*or as the case may be*].

II. That on the day of, 187., the plaintiff entered upon the service as aforesaid, and has ever since been, and still is, ready and willing to continue in such service.

IV. That on the day of, 187., the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[*Demand of Judgment.*]

1. Discharge of Employee.—Where no definite period of employment is agreed upon between master and servant, the master has a right to discharge the servant at any time, and to eject him by force if he refuses to leave after receiving notice to that effect, but no more force than is necessary. (*DeBriar v. Minturn*, 1 *Cal.* 450.) But where a contract for services is made for a fixed period, if the employer discharge the servant without good cause, the servant may recover the stipulated wages. *Webster v. Wade*, 19 *Cal.* 291.

2. Entire Contract.—A distinction exists between contracts for specific work and contracts for the *hire* of clerks, agents, laborers, domestic servants, etc., for a specified *period*. In the latter, if the person employed is improperly dismissed before the term of service has expired, he is entitled to recover for the whole term, unless the defendant can show, by way of defence, that the plaintiff was actually engaged in other profitable service during the term, or that such employment was offered to him and rejected. *Costigan v. Mohawk and Hudson River R.R. Co.*, 2 *Den.* 609; 2 *Greenl. Ev.* 273, § 261 a.

3. Measure of Damages.—The measure of damages is not the entire contract price, but a just recompense for the actual injury which the party has sustained. *Clark v. Marsigha*, 1 *Den.* 317.

4. Offer to Perform.—The rejection of the offer to perform services excuses the performance as a condition precedent, but does not release the plaintiff from his obligation to perform so long as he insists upon the agreement. (*Cooper v. Pena*, 21 *Cal.* 403.) When the plaintiff has been wrongfully discharged, this averment is all that is necessary. He need not aver an *offer* to serve. (*Wallace v. Warren*, 4 *Exch.* 364; 7 *Dowl. & L.* 60.) For if any one is bound to do a thing, he must either do it or offer to do it, and if no objections are made, he must show that he made a tender in a regular manner. *Blight v. Ashley*, *Pet. C. Ct.* 15.

5. Rescission of Contract.—If the servant willfully desert the employer's service, the employer is not bound to receive him again, and he cannot recover for past services. (13 *Johns*. 94; 12 *Id.* 165; 2 *Stark*. 256; 2 *Mass.* 147; *Santry v. Parks*, 8 *Cow.* 63.) Plaintiff agreed to work seven months for defendant, at ten dollars per month, unless one or the other should become dissatisfied. He worked six months and a half, and left, alleging that he had business to attend to. *Held*, that he could not recover. *Morrell v. Burns*, 4 *Den.* 121.

No. 274.

ii. *The Same—where the Employment never took Effect.*

[TITLE.]

The plaintiff complains, and alleges:

I. [*As in last form.*]

II. That on the day of, 187., at, the plaintiff offered to enter upon the service of the defendant, and has ever since been ready and willing so to do.

III. That the defendant refused to permit the plaintiff to enter upon such services, or to pay him for his services.

[*Demand of Judgment.*]

No. 275.

iii. *For Breach of Contract to Serve.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant, at [a monthly] compensation of dollars, and that

the defendant should serve the plaintiff as [bookkeeper] for the term of [one year].

II. That the plaintiff has always been ready and willing to perform his part of the said agreement [and on the day of, 187., offered so to do].

III. That the defendant refused to serve the plaintiff as aforesaid, to his damage dollars.

[*Demand of Judgment.*]

6. Age of Apprentice.—That the master of an apprentice is concluded by the recital in the indentures of the age of the boy, (*McCutchin v. Jamieson*, 1 *Cranch C. Ct.* 348.) And that a stranger to the indentures cannot take advantage of the omission to insert the age of the apprentice in the indentures, see *Heinecke v. Rawlings*, 4 *Cranch C. Ct.* 699.

7. Assignment of Indentures.—A master cannot assign the indentures of an apprentice. (*Handy v. Brown*, 1 *Cranch C. Ct.* 610.) And therefore a note given for such an assignment, being based upon a void contract, cannot be recovered. *Walker v. Johnson*, 2 *Cranch C. Ct.* 203.

8. Apprentice's Wages.—The master is entitled to his apprentice's wages when hired by another, whether the person hiring knew or not that he was an apprentice. (*James v. Leroy*, 6 *J. R.* 274; *Munsey v. Goodwin*, 3 *N. H.* 272; *Bowes v. Tibbets*, 7 *Greenlf. Rep.* 457; *Conant v. Raymond*, 2 *Aik.* 243.) The right of the master to the earnings of the apprentice, in the way of his business, or of any other business which is substituted for it, does not extend to his extraordinary earnings, which do not interfere with the profit which the master may legitimately derive from his services. *Mason v. The "Blaireau,"* 2 *Cranch*, 240.

No. 276.

iv. *By the Master, against the Father of Apprentice.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, one A. B., with the consent of the defendant, made an indenture under his hand and seal, a copy of which is hereto annexed.

II. That at the same time and place, the defendant entered into an agreement, under his hand and seal, a copy of which is also hereto annexed [*or state the tenor of these covenants*].

III. That on the day of, 187., the said A. B. willfully absented himself from the service of the plaintiff, and continues so to do, to his damage dollars.

[*Demand of Judgment.*]

[*Annex Copy of Indenture.*]

9. Breach, how Alleged.—The allegation that the defendant had not used any endeavors to have the apprentice serve, and refused to do anything, sufficiently showed a breach. *Van Dorn v. Young*, 13 *Barb.* 286.

10. Covenants.—The usual covenants in an apprentice's indenture are independent, and the plaintiff need not aver performance on his part. *Phillips v. Clift*, 4 *Hurl. and Nor.* 173.

11. Liability of Parent.—That the father of an apprentice may be held liable upon the indenture, by reason of his signature and seal, although there are no express words of covenant binding him, *Woodrow v. Coleman*, 1 *Cranch C. Ct.* 71.

*No. 277.**v. By the Apprentice, against the Master.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, the defendant entered into an agreement with the plaintiff, and his father Benjamin Rider, under his and their hands and seals, a copy of which is hereto annexed.

II. That the defendant has not [instructed the plaintiff in the business of, *or state any other breach*].

[Demand of Judgment.]

12. Right of Action.—An apprentice may sue a master for not teaching him his trade, although no indentures were executed, the master having taken him under an order of the Court. *Adams v. Miller*, 1 *Cranch C. Ct.* 5.

*No. 278.**vi. For Breach of Contract to Manufacture Goods.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant promised and agreed with the plaintiff to manufacture and deliver to the plaintiff 400 dozen woolen hose, at the price of dollars for each dozen, for which the plaintiff agreed to pay the defendant dollars.

II. That the plaintiff duly performed all the conditions of said agreement on his part.

III. That defendant did manufacture, under said agreement, but manufactured them in an unskillful and unworkmanlike manner, to the damage of the plaintiff
 dollars.

[*Demand of Judgment.*]

No. 279.

vii. *For Refusing to Accept Manufactured Goods.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant contracted with the plaintiff to make for him [*describe what*], and agreed to pay for the same, upon delivery thereof, dollars.

II. That the plaintiff made the said goods, and on the day of, 187., offered to deliver the same to the defendant, and has ever since been ready and willing to deliver them, and has otherwise duly performed all the conditions on his part.

III. That the defendant has not accepted or paid for the same.

[*Demand of Judgment.*]

[*Copy of Contract.*]

No. 280.

viii. *On a Promise to Manufacture Raw Material into Merchantable Goods.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff delivered to the defendant [sides of leather], of the value of dollars, to be manufactured into [harness], for a reasonable compensation, to be paid to the defendant by the plaintiff.

II. That the defendant, in consideration thereof, undertook to manufacture the said [harness], or cause it to be manufactured, from the [leather], and to deliver the same to the plaintiff when so manufactured.

III. That the said [leather] was so manufactured into [harness] by the defendant before the day of, 187., on which day the plaintiff demanded the same of the defendant, and then and there offered to pay him a reasonable compensation for manufacturing the same.

[Or III. That the defendant did not manufacture said [leather] into [harness], although a reasonable time therefor elapsed before this action.]

IV. That the defendant, then and ever since, refused and neglected to deliver the same, and has converted them to his own use.

[Or IV. That the defendant manufactured said [leather] in such a negligent and unskillful manner, that the said [harness] was of no value.]

[Demand of Judgment.]

CHAPTER V.

INDEMNITY.

No. 281.

- i. *By Retiring Partner, on the Remaining Partner's Promise to Indemnify him against Damage.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant, being partners in trade under the firm name of A. & B., dissolved the said partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm, and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the said firm.

II. That the plaintiff duly performed all the conditions of the said agreement on his part.

III. That on the day of, 187., a judgment was recovered against the plaintiff and defendant by one John Doe, in the Court of this State, upon a debt due from the said firm to the said Doe, and on the day of, 187., the plaintiff paid dollars in satisfaction of the same.

IV. That the defendant has not paid the same to the plaintiff.

[*Demand of Judgment.*]

1. Actual Damage.—In actions upon an ordinary contract to indemnify against loss or damage, the plaintiff must aver actual damage; and if he has paid under a judgment this should be stated, with the date of the judgment, the court in which it was rendered, and the amount of the judgment; while on an agreement to save from liability actual damage need not be averred; (*McGee v. Roen*, 4 *Abb. Pr.* 8;) but consequential damages must be specially alleged. (*Swan's Pl.* 381.) In actions on an indemnity, actual damages should be alleged, as in such cases as the plaintiff was compelled to pay by suit; but on an agreement to save from liability it is not necessary to aver actual damage. (*McGee v. Roen*, 4 *Abb. Pr.* 8.) For allegations in such actions, see *Allaire v. Onland*, 2 *Johns. Cas.* 52; *Holmes v. Weed*, 19 *Barb.* 128.

2. Administrator's Bond.—Where an administrator makes premature payment of a claim, and takes a bond of indemnity, such a bond would be held legal and binding. *Comstock v. Breed*, 12 *Cal.* 289.

3. Attachment, Release from.—Recovery may be had on a bond given to a Sheriff, to release property from attachment, to the extent of the penalty. (*Palmer v. Vance*, 13 *Cal.* 553.) Such bond is not a statutory undertaking, and is valid at common law. Execution against the judgment-debtor is not a condition precedent to suit on the bond, and any mistake in the recital as to the amount for which attachment issued may be explained and corrected by parol. (*Id.*) It takes effect at the time of its delivery. (*Buffendeau v. Brooks*, 28 *Cal.* 641.) Such a bond is for the benefit of the plaintiff, who may sue upon it, and if the sheriff takes a sufficient statutory undertaking, he has no further responsibility. (*Curiac v. Packard*, 29 *Cal.* 194.) The bond given to release property attached, only releases it from the custody of the sheriff, and is not an actual substitution of security, compelling the plaintiff to proceed upon the bond alone to collect his payment. (*Low v. Adams*, 6 *Cal.* 277.) An indemnity bond to the sheriff to retain property seized under attachment, is an instrument necessary to carry the power to sue into effect. *Davidson v. Dallas*, 8 *Cal.* 227.

4. Conditions Precedent.—If the obligors undertake to indemnify the sheriff for any damage by reason of any costs, suits, judgments, and executions, that shall come or be brought against him, the sheriff cannot maintain an action on the bond because judgment has been rendered against him, but must first pay the judgment. (*Lott v. Mitchell*, 32 *Cal.* 23.) If the sheriff is indemnified for the act alone, and a suit

is brought against him and judgment recovered, the sheriff cannot afterwards have judgment on the indemnity bond, unless he give the sureties notice of the action brought against him. *Dennis v. Packard*, 28 Cal. 101.

5. Contracts of Indemnity.—As to contracts of indemnity, and rules in reference thereto, see Theobald's *Principal and Surety*; *Chitty jr. Contr.* (5 Am. Ed.) 56; 9 Cow. 154; 4 Pick. 83; 8 Wend. 452.

6. Damage must be Shown.—In an action on a bond of indemnity, the plaintiff must set out wherein he has been damnified. A general averment of loss is sufficient. *Coe v. Rankin*, 6 McLean, 354.

7. Demand.—Where defendant agreed to indemnify the plaintiff against loss on a sale of stock, *on demand*, an action for the deficiency may be maintained at any time after the sale, without a previous demand. *Halleck v. Moss*, 22 Cal. 266.

8. Execution, Seizure Under.—An agreement to indemnify a sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right. *Stark v. Raney*, 18 Cal. 622.

9. Injunction.—A bond of indemnity, executed in pursuance of articles of agreement, may in equity be restrained so as to conform to those articles. But a departure from the articles must be clearly shown. (*Finley v. Lynn*, 6 Cranch, 238.) Thus, under an agreement to indemnify a retiring partner against demand upon the concern, and a bond of indemnity reciting that it was agreed to indemnify against debts, including those due from others which had been assumed; *Held*, that the bond might be enforced. *Id.*

10. Liability of Sureties.—Where the sheriff, under a writ of attachment, is about to levy upon the property of a firm, and a bond is executed by third parties as sureties, conditioned to keep harmless and indemnify the sheriff against all damages and expense he may be put to by reason of the non-seizure of the property, and "to pay whatever judgment may be rendered against said defendants;" and judgment was obtained against *one only* of the defendants—plaintiffs failing on the trial to prove the other to be a partner—the sureties are liable on the bond for the amount of the judgment; that the bond, though not

strictly an undertaking under the statute, conforms substantially to its requirements, and must be read by the light of the statute, and interpreted according to the intention of the parties. (*Heynemann v. Eder*, 17 *Cal.* 433.) Such bond will be presumed to have been executed with reference to the provisions of the statute; and will be held such a security, and the fact that judgment was obtained against one only of the defendants, satisfies the condition to "pay whatever judgment may be rendered against said defendant." *Id.*

11. Liability, Discharge from.—Whenever the liability of the sureties is fixed by the rendition of a judgment in favor of the plaintiff, the sureties have a right to tender the plaintiff the full amount of the judgment, and if he refuses to receive the same, the sureties are discharged from their obligation in the undertaking. (*Hayes v. Josephi*, 26 *Cal.* 535.) Such tender is equivalent to payment or release by said plaintiff. (*Norwood v. Kenfield* 34 *Cal.* 339.) The sureties are likewise discharged where the principal tenders to the plaintiff the full amount of his debt and costs, and the plaintiff refuses to receive the tender. *Curiac v. Packard*, 29 *Cal.* 194.

12. Material Averment.—In an action on a bond to indemnify the plaintiff against damages he might sustain by the levy of an attachment, the plaintiff alleged the recovery of a judgment against plaintiff for damages against which he was indemnified, and the payment of said judgment. The averment of payment was material to plaintiff's right to recover for the amount of such judgment. *Roussin v. Stewart*, 33 *Cal.* 208.

13. Necessary Expenses.—The averment that plaintiff necessarily incurred expenses, is equivalent to the allegation that he incurred necessary expenses. (*Glover v. Tuck*, 1 *Hill*, 66.) And the complaint must show how and in what manner these necessary expenses were incurred, naming the court in the allegation. (*Patton v. Foote*, 1 *Wend.* 207.) But the failure to make such an averment is not fatal; it is at most but an irregularity. *Packard v. Hill*, 7 *Cow.* 434.

14. Notice to Sureties.—If an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties; and the Court or Judge in vacation may, on motion, upon notice of five days, order judgment to be entered

up against them for the amount so recovered, including costs. (*Cal. Pr. Act*, § 645.) The provision of the Practice Act is founded upon the principle that the action, under such circumstances, is in substance against the indemnifier, the real party in interest, and that he has in that action an opportunity to make any defense that may exist. (*Dutil v. Pacheco*, 21 *Cal.* 438.) Where, therefore, the indemnifier has been so notified, he cannot maintain a bill in equity to set aside the judgment obtained therein, except under such conditions as would have enabled him to maintain it, had he been the nominal as well as real party defendant to the first action. *Id.*

15. Remedy.—Where an indemnity bond is given to a sheriff to hold him harmless, his remedy at law on the bond is clear for the amount of any such judgment, whether he be solvent or not, or whether his official sureties could be held or not. *White v. Fratt*, 13 *Cal.* 521.

16. Sale under Execution.—A bond given to a sheriff to indemnify him for any loss or damage he may sustain by selling property levied on by him, by virtue of an execution, in violation of an order enjoining its sale, is void, because an unlawful contract. *Buffendeau v. Brooks*, 28 *Cal.* 641.

17. Trespass.—An agreement to indemnify a party for a willfull trespass about to be committed, is void, as against public policy. *Stark v. Raney*, 18 *Cal.* 622.

No. 282.

ii. *Against Sureties in Partner's Bond of Indemnity against Liability.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the plaintiff and one A. B. were co-partners, in business as merchants, in the city of, under the firm-name of A. B. & Co., and thereafter on the same day they dissolved their connection as such co-partners, and thereupon entered into an agreement in writing, of said date, duly executed and signed by them respectively, whereby it

was, among other things, mutually agreed that the said A. B. should retain and keep to his sole and separate use all and singular the partnership property of every name and character, whether in action or possession, and wheresoever situated; and in consideration thereof, that he should pay and discharge the debts so due by the said firm, to the extent of dollars, from his own individual resources, and to the like extent hold the plaintiff harmless and indemnified, of and from and by reason of any and all claims or liabilities due by said firm, a copy of which agreement is hereto annexed, as a part of this complaint, marked Exhibit "A."

II. That the defendants, in consideration of said agreement between said A. B. and the plaintiff, and of one dollar to each of them then paid by the plaintiff, entered into an agreement, executed and signed by them respectively, a copy whereof is annexed hereto as a part of this complaint, and marked Exhibit "B.," whereby they severally undertook and bound themselves to the plaintiff, for the faithful performance by the said A. B. of the covenants in said agreement, to be kept and performed on said A. B.'s part.

III. That said A. B., under his said agreement with the plaintiff, retained and kept to his sole and separate use all the partnership property of the firm; but has not, pursuant thereto, paid and discharged the debts due by said firm to the extent aforesaid; and has failed to hold this plaintiff harmless and indemnified to the like extent, of and from and by reason of any claims or liabilities due by the said firm.

IV. That at the time of the dissolution of the partnership, and of the making of the agreement aforesaid, the said firm was indebted to the firm of R. & Co., of

....., for merchandise sold and delivered, in the sum of dollars, which was then due and payable; which indebtedness formed a part of the dollars, debts of A. B. & Co., and was included among such debts, to be paid by the said A. B., under his agreement aforesaid with the plaintiff; but the said A. B., although requested, would not pay R. & Co. their said demand, or any part thereof.

V. That on the day of last, an action was commenced by the plaintiff, in the [*state the court*], to recover upon and by virtue of the aforesaid agreement, from the said A. B., the said amount with interest, then due by the said A. B. & Co. to the said firm of R. & Co., amounting to dollars, and interest thereon; and such proceedings were thereupon had, that on the day of, 187., judgment was rendered in such action in favor of the plaintiff against the said A. B., for the sum of dollars, including costs; upon which judgment execution was at once issued against the said A. B., and returned wholly unsatisfied.

VI. That the plaintiff has paid dollars, the amount of said judgment, and other necessary costs, disbursements, and attorneys' fees therein, amounting to dollars.

VII. That he has demanded from the defendants payment of the said amounts, but they have not paid the same.

[*Demand of Judgment.*]

[*Annex Copies of Agreements, marked Exhibits "A," and "B."*]

18. Notice of Debt.—That the defendants had notice of the debt need not be alleged, as it is matter which lies properly in the knowledge of the defendant, especially if it is averred that the books

and papers of the firm were transferred to the defendants. *Clough v. Hoffman*, 5 *Wend.* 499.

19. Partnership Indemnity.—Where a partner, in retiring, covenants to indemnify his successors against all liabilities connected with the business in which the parties had before been engaged, the covenant did not apply to the liabilities incurred by the plaintiff while he carried on the business on his own account. *Haskell v. Moore*, 29 *Cal.* 437.

No. 283.

iii. *Surety against Principal, for Indemnity against Liability as Surety.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, in consideration that the plaintiff would become surety for him, by executing an undertaking, of which a copy is annexed as a part of this complaint, marked "Exhibit A.," agreed with the plaintiff that he would indemnify him, and save him harmless from and against all damages, costs, and charges which he might sustain by reason of his becoming surety as aforesaid.

II. That the plaintiff, confiding in such promise of the defendant, executed and delivered such undertaking.

III. That the defendant did not indemnify the plaintiff, and save him harmless from such damages, costs, and charges; but, on the contrary, the plaintiff, by a judgment, on the day of, 187., rendered against him by the Court, at, in an action brought against him upon said undertaking, paid, on the day of, dollars to, in satisfaction and discharge of said undertaking, and also necessary costs

and expenses in said action and on account of said undertaking, to the amount of dollars.

IV. That notice thereof was given to the defendant, and that the plaintiff duly performed all the conditions of the said agreement on his part.

V. That the defendant has not paid the same to the plaintiff.

[*Demand of Judgment.*]

[*Annex Copy of Undertaking, marked "Exhibit A."*]

20. Costs.—As to the right to recover costs paid and incurred by the surety, see *Chitt. jr. Contr.* (5 *Am. Ed.*) 504; 6 *Johns.* 131; 1 *Pet.* 350; 17 *Eng. C. L. Rep.* 457; 4 *Taunt.* 464; 19 *Eng. C. L. Rep.* 338; 16 *Johns.* 70; 2 *Wend.* 484; 2 *McCord*, 159.

21. Right of Surety.—Where Jones, for the accommodation of Smith, indorses a note to Stiles, and Smith delivers an article of property to Jones to indemnify him against his liability on the indorsement, Stiles can in equity avail himself of the security for the satisfaction of the note. Jones merely seeks to indemnify himself; he is not to make profit out of the indorsement. He is personally liable to pay the whole debt, whether he receives anything from the principal or not, and it is his duty to pay it; and as Jones holds property in his hands, belonging to his principal, expressly for his indemnity, if it is applied to the payment of the debt, both the duty of himself and his principal is discharged, and the indemnity at the same time satisfied. *Van Orden v. Durham*, 35 *Cal.* 145.

No. 284.

iv. *Sub-Tenant against his Immediate Lessor.*

[TITLE.]

The plaintiff complains, and alleges:

I. That, at the times hereafter mentioned, the defendant held certain premises [*describe them*], as tenant thereof to one A. B., at a monthly rent of

dollars, payable by the defendant to said A. B. on the [*state time of payment*].

II. That on the day of, 187., in consideration that the plaintiff then became the tenant to the defendant of said premises, at a monthly rent of dollars, payable to him by the plaintiff, the defendant gave to the plaintiff an agreement to indemnify him, of which the following is a copy: [*Copy agreement.*]

III. That the defendant, contrary to his agreement failed to pay the rent for the month of, which was during the tenancy of the plaintiff under said agreement.

IV. That by reason thereof, said A. B., on the day of, 187., in the Court, commenced proceedings to recover possession of said premises, which were then occupied by the plaintiff under said agreement, for the non-payment of said rent; and thereby the plaintiff, on the day of, 187., was compelled to pay to said A. B., to the use of the defendant, the sum of dollars, the amount of said rent, together with dollars, the costs, disbursements, and attorneys' fees therein.

V. That he has demanded from the defendant payment of the said amounts, but he has not paid the same.

[*Demand of Judgment.*]

22. Consequential Damages.—To recover consequential damages or costs, the averment must be special.

23. Eviction by Wrong Doer.—If a tenant is evicted by a wrong doer, the landlord is not bound to indemnify him. (*Schilling v. Holmes*, 23 *Cal.* 227.)

*No. 285.**v. On Agreement of Indemnity to Plaintiff for Defending Action for
Surrender of Property.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the day of, 187., one A. B. deposited with the plaintiff dollars.

II. That afterwards, on the day of, 187., the plaintiff, at the request of the defendant, delivered to him the said sum of money so deposited by A. B., which money the defendant claimed; and that the plaintiff did not know to whom the same belonged.

III. That afterwards, on the said day of, 187., the plaintiff, at the request of the defendant, agreed with the defendant that he would defend any action which the said A. B. should commence against him for the said money; and the defendant, in consideration of the premises, then promised the plaintiff to indemnify and save him harmless from the consequences of such an action.

IV. That the said A. B., on the day of, 187., commenced an action against the plaintiff in the [*state the court*], for the recovery of the said sum of money, of which the defendant then had notice.

V. That the plaintiff, with the privity of the defendant, and to the best of his ability, defended the said action; but the said A. B., on the day of, 187., at a general term of said Court, recovered a judgment against the plaintiff in said action, to the amount of dollars; and, afterwards, an execution was

issued upon the said judgment, against the property of the plaintiff, who, on the day of 187., paid the said sum of dollars, and, also, the sum of dollars, for officers' fees, and other expenses upon the said writ. And the plaintiff was also, by means of the premises, compelled to pay other charges and expenses, for costs and disbursements and counsel fees, amounting to the sum of dollars, in defending the said action.

VI. That the defendant has not paid the same to the plaintiff.

[*Demand of Judgment.*]

24. Voluntary Payment.—Under a bond conditioned to indemnify the obligee against being compelled by law to pay a second time a sum claimed by and paid to the obligor, if the obligee is subsequently sued by two other persons separately claiming the same sum, and interpleads such plaintiffs by suit in chancery, and by leave obtained pays the money into Court, this is not a breach of the bond, for it is a voluntary payment. *Massey v. Schott, Pet. C. Ct. 132.*

CHAPTER VI.

PROMISE OF MARRIAGE.

No. 286.

i. *For Refusal to Marry.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, in consideration that the plaintiff, who was then unmarried, would, at the request of the defendant,

marry him on request, the defendant promised to marry the plaintiff within a reasonable time.

II. That the plaintiff, confiding in said promise, has always since remained and continued, and still is sole and unmarried, and has been for and during the time aforesaid, and now is ready and willing to marry the defendant.

III. That the defendant refuses to marry the plaintiff, although a reasonable time elapsed before this action [or although she, on the . . . day of . . . , requested him so to do], to her damage in the sum of . . . dollars.

[*Demand of Judgment.*]

1. **Action.**—That a man may maintain an action for breach of promise to marry, see *Harrison v. Gage*, 1 *Ld. Raym.* 386; *Carth.* 467; 1 *Salk.* 54; 5 *Mod.* 511.

2. **Birth of Child.**—An action for breach of promise of marriage will not be made to survive by proof that the promisee had a child, born out of wedlock, now living, and that the defendant is the father of said child. *Hovey v. Page*, 55 *Me.* 142.

3. **Consideration.**—Marriage is a consideration as valuable as money, if *bona fide*. *Magniac v. Thompson*, 1 *Bald.* 344.

4. **Contract Mutual.**—The action on a promise to marry is sustainable only when the contract is mutual. (1 *Rol. Ab.* 2, 215; 1 *Sid.* 180; 1 *Lev.* 147; *Carth.* 467; 2 *Ind.* 234.) And though one of the parties be an infant, the contract is binding on the other. (2 *Stra.* 937; *Bac. Abr. Infant*, 7 *Cow.* 22.) But an executor cannot sue. 2 *M. & S.* 408.

5. **Damages.**—Damages for pecuniary loss may be recovered, as for loss of time in preparing for marriage; (*Smith v. Sherman*, 4 *Cush.* 408;) as well as for suffering and injury to prospects in life. (1 *Pars. on Contr.* 543.) And seduction will aggravate the breach. (*Wells v. Padgett*, 8 *Barb.* 323.) Special damages for impaired health may be

alleged and proved, if resulting from the breach. (*Bevell v. Powell*, 13 *Barb.* 183.) Whatever damages the plaintiff may have suffered in consequence of the defendant's refusal to marry her, she is legitimately entitled to recover; and these damages are to be estimated from the circumstances of the parties, and the situation in which the plaintiff is left by the defendant's refusal to perform his contract. 12 *Ill.* 449.

6. Deceit and Injury.—Deceit and injury are presumed from the breach, and need not be alleged. *Leopold v. Poppenheimer*, 3 *Code R.* 39.

7. Declaration of Defendant.—In an action for breach of promise of marriage, the declaration of the defendant that he would make a good home for the plaintiff, made at the time, and as part of his conversations with the plaintiff, which are declared on as establishing the promise of marriage, are admissible in connection with the other conversations, as tending to prove the contract. *Button v. McCauley*, 5 *Abb. Pr. (N.S.)* 29.

8. Promise on a Day Set.—If the promise were to marry on a day set, or on request, it should be so specifically alleged, and the request must be averred and proved. (*Short v. Stone*, 8 *Q. B.* 358; 50 *Eng. Com. L. R.* 356; *Caines v. Smith*, 15 *Mees. & W.* 189; *Harrison v. Cage*, 1 *Ld. Raym.* 386; *Millward v. Littlewood*, 1 *Eng. L. & Eq. R.* 408; and compare *Lovelock v. Franklyn*, 8 *Q. B.* 371; 50 *Eng. Com. L. R.* 371.) But otherwise request need not be alleged. 1 *Pars. on Contr.* 544; *Turner v. Baskin*, 2 *W. Law M.* 98.

9. Promise Implied.—That a promise of marriage may be implied from circumstances, see *Hotchkins v. Hodge*, 38 *Barb.* 117.

10. Promise after Seduction.—A promise of marriage made after seduction has been effected, and in consequence thereof, is not thereby rendered invalid. It is not liable to the objection that it encourages immorality, because the wrong has been already perpetrated. *Hotchkins v. Hodge*, 38 *Barb.* 117.

11. Request.—Positive proof of request and refusal is never required; but they may be inferred from circumstances, and the request may be made by the father or other friend, whose authority may be inferred from existing relations. (32 *Ill.* 312.) The plaintiff must, however, aver a special request or an offer to perform. A bare allega-

tion of readiness and willingness is not sufficient. 1 *Littell*, 234; 3 *Gilm.* 212.

12. Seduction.—Where a seduction is accomplished by means of a promise of marriage on the part of the seducer, a consent of the female to marry the seducer, amounting to a mutual promise on her part to marry, may be implied. *People v. Kenyon*, 5 *Park. Cr.* 254.

13. Time Alleged.—Where the promise is special, as “after the death of the defendant’s father,” it should be so declared on, with proper averments. (2 *Peake*, 103; *Chitt. on Contr.* 426.) But it is not necessary that the time of marriage should be specified. (*Carth.* 467.) But if the promise was to marry on a particular day, it should be so stated. 2 *Chitt.* 324; see 1 *Chitt.* 409; 1 *M. & P.* 239.

No. 287.

ii. *For Marriage with Another.*

[TITLE.]

The plaintiff complains, and alleges:

I. and II. [*Same as preceding form.*]

III. That the defendant afterwards married a certain other person, to wit, one A. B., contrary to his said promise to the plaintiff.

[*Or* III. That at the time of making said promise, the defendant represented to the plaintiff that he was unmarried, whereas, in fact, he was then married to another person, of which fact the plaintiff had no notice.]

[*Demand of Judgment.*]

14. Married Man Liable.—A single woman, to whom a man, in fact married, represents that he is single, and promises marriage, may maintain an action against him for his breach of promise. 7 *C.B.* 999; 1 *E. L. & E.* 408; *Blattmacher v. Saal*, 29 *Barb.* 22; 7 *Abb. Pr.* 409.

15. Request.—In case of the marriage of defendant, a request need not be alleged. (1 *Pars. on Cont.* 544; *Short v. Stone*, 8 *Q. B.* 358; *S. C.*, 50; *Eng. C. L. Rep.* 356; *Caines v. Smith*, 15 *Mees. & W.* 189; *Harrison v. Cage*, 1 *Ld. Raym.* 386; *Millward v. Littlewood*, 1 *Eng. L. & Eq. R.* 408; compare *Lovelock v. Franklyn*, 8 *Q. B.* 371; *Turner v. Baskin*, 2 *W. Law M.* 98.) The averment of marriage dispenses with request. *Short v. Stone*, *Supra*.

CHAPTER VII.

SALE AND DELIVERY OF CHATTELS.

No. 288.

i. *Seller against Purchaser, for Refusing to Receive and Pay for Goods.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant entered into an agreement, in substance as follows: [*state the agreement.*]

II. That the plaintiff duly performed all the conditions of said contract on his part, and was, on the day of, 187., at [*the day and place of delivery*], ready and willing to deliver said property, and tendered the same to the defendant.

III. That defendant refused to accept said goods, or pay for them, pursuant to said agreement, to the damage of the plaintiff dollars.

[*Demand of Judgment.*]

1. Constructive Delivery.—A statement of circumstances constituting a constructive delivery as equivalent to an actual delivery, should be unequivocal. (*Bailey v. Ogden*, 3 *Johns.* 399.) A delivery to the purchaser of a city weigher's certificate of sugar lying on the wharf, is a sufficient delivery. (*Glasgow v. Nicholson*, 25 *Mo.* 29.) The delivery of the export entry is not a delivery of the article sold. (*Johnson v. Smith*, *Anth. N.P.* 81.) Mere delivery of a bill of parcels is not sufficient. (*Smith v. Mason*, *Anth. N.P.* 225.) The delivery of an order on the custom house, when the buyer fraudulently intends not to pay, knowing his inability to do so, is no delivery. (*Ives v. Polak*, 14 *How. Pr.* 411.) The delivery, with indorsement, of a shipping broker's acknowledgment of the receipt of merchandise to be transported, drawn in the form of a bill of lading, but not signed by the carrier, is sufficient to constitute a constructive delivery of merchandise to one who made advances upon the faith of it. (8 *How. U.S.* 284; 4 *Comst.* 497; *Rowls v. Deshler*, 28 *How. Pr.* 66.) An order on the depository of goods sold, given by the vendor to the vendee, constitutes a delivery as between themselves. (*Sigerson v. Harker*, 15 *Mo.* 101.) The transfer of warehouse receipts operates as a constructive delivery of the goods. *Burton v. Curyea*, 40 *Ill.* 320.

2. Custom of Trade.—Where, by a custom of the trade, a buyer of goods on shipboard is bound to unload within a definite time, if by reason of the buyer's failure to take goods within that time the owner is obliged to pay lighterage and storage fees thereon, the buyer is liable for such payments. 1 *Com. Bench R.* 304; 1 *Exch. R.* 17; 5 *Taunt.* 615; 2 *Bos. & Pul.* 268; 2 *E. D. Smith*, 128; 7 *Wend.* 119; *Dayton v. Rowland*, 1 *Daly*, 446.

3. Delivery.—Selecting goods, and putting them aside in the seller's shop, held sufficient delivery, (*Brewer v. Salisbury*, 9 *Barb.* 511.) The delivery of the keys of a warehouse in which goods sold are deposited is a sufficient delivery. (*Wilkes v. Ferris*, 5 *Johns.* 335; *Gray v. Davis*, 10 *N.Y.* 285.) Merely taking samples does not amount to a delivery. (*Johnson v. Smith*, *Anth. N.P.* 81; *Carver v. Lane*, 4 *E. D. Smith*, 168.) There can be no delivery so long as any thing remains to be done by the seller to ascertain the *quantity* or *quality* of the goods. (*Cunningham v. Ashbrook*, 20 *Mo.* 553; *Outwater v. Dodge*, 7 *Cow.* 85.) Or so long as any thing remains to be done by *either party* to ascertain the *price*. (*Ward v. Shaw*, 7 *Wend.* 404.) Cumbersome and heavy articles may be delivered without actual removal. Delivering a

schedule, followed by an agreement on the part of the buyer with the depositary for keeping charge of them, is sufficient. *Dixon v. Buck*, 42 *Barb.* 70.

4. Delivery, how Alleged.—Tender and refusal of goods on the part of the principals is equivalent to delivery, and may be specially averred. (*Kemble v. Wallis*, 10 *Wend.* 374.) A performance of all the conditions on his part may be alleged.

5. Growing Crops.—A growing crop, until ready for the harvest, cannot by itself become the object of a delivery, and can only be delivered into the possession of the vendee by delivering to him the possession of the land also of which it is a part. (*Davis v. McFarland*, *Cal. Sup. Ct., Jul. T.*, 1869.) Growing crops are not unlike ships and cargoes at sea in respect to their delivery, of which delivery cannot be made until they reach port. If delivery be made within a reasonable time after reaching port, the sale is good as against creditors and subsequent purchasers. *Joy v. Sears*, 9 *Peck.* 4; *Portland Bank v. Stacey*, 4 *Mass.* 661; *Buffington v. Curtis*, 15 *Id.* 528.

6. Growing Crops, Delivery of.—They are not subject to manual delivery until they are harvested, and therefore until harvested they are not in the possession or under the control of the vendor, within the meaning of the Statute of Frauds. *Bours v. Webster*, 6 *Cal.* 660; *Visher v. Webster*, 13 *Id.* 58; *Pacheco v. Hunsaker*, 14 *Id.* 120; *Bernal v. Hovious*, 17 *Id.* 541; *Robbins v. Olahan*, 1 *Duval (Ky.)* 28; cited in *Davis v. McFarland*, *Cal. Sup. Ct., Jul. T.*, 1869.

7. Growing Crops not Affected by Statute.—A growing crop, while growing, and until ready for the harvest, is also unaffected by the fifteenth section of the statute in relation to the sale of goods and chattels in the possession and under the control of the vendor. *Davis v. McFarland*, *Cal. Sup. Ct., Jul. T.*, 1869.

8. Growing Crops, Sale of.—Contracts for the sale of growing periodical crops are not within the Statute of Frauds, and therefore need not be made in writing. (*Davis v. McFarland*, *Cal. Sup. Ct., July T.* 1869; citing *Marshall v. Ferguson*, 23 *Cal.* 65.) So, a contract to deliver corn not yet gathered or husked, as it requires labor to be expended on the subject matter to prepare it for delivery, is not within the Statute of Frauds. (*Rentch v. Long*, 27 *Md.* 188; see *Stephens v. Santee*, 51 *Barb.* 532.) It is not the policy of the law to interdict sales

of growing crops by declaring them absolutely fraudulent, on the mere ground that the seller retains, as he must necessarily do, the possession of the property until it shall become susceptible of actual delivery. *Davis v. McFarland*, *Cal. Sup. Ct.*, *July T.*, 1869; citing *Whipple v. Foot*, 2 *Johns.* 418.

9. Liability of Carrier.—Upon demand by the vendor, while the right of stoppage *in transitu* continues, the carrier will become liable for a conversion of the goods, if he decline to re-deliver them to the vendor, or delivers them to the vendee. (*Markwald v. His Creditors*, 7 *Cal.* 213; *Blackman v. Pierce*, 23 *Id.* 508; *O'Neil v. Garrett*, 6 *Iowa*, 480; *Reynolds v. Railroad*, 43 *N.H.* 580.) And a notice, without demand, to re-deliver, is sufficient to charge the carrier, if he is clearly informed that it is the intention and desire of the vendor to exercise his right of stoppage *in transitu*. (*Reynolds v. Railroad*, 43 *N.H.* 580; *Litt v. Cowley*, 7 *Taunt.* 169; *Whitehead v. Anderson*, 9 *M. & W.* 518; *Bell v. Moss*, 5 *Whart.* 189.) And notice to the agent of the carrier, who in the regular course of his agency is in the actual custody of the goods at the time the notice is given, is notice to the carrier. *Brier v. Red Bluff Hotel Co.*, 31 *Cal.* 160; cited in *Jones v. Earl*, *Cal. Sup. Ct.*, *Jul. T.*, 1869.

10. Measure of Damages.—In an action against a purchaser for not receiving goods according to contract, the rule of damages is the difference between the contract price and the market value at the time of the breach of the contract. *Haskell v. Henry*, 4 *Cal.* 411.

11. Partial Rescission.—M. sold B. eight bags of wool, separately marked and kept as one lot of a particular kind, at one dollar a pound, by one bill of parcels, B. having first opened some of the bags. Part of the wool in one bag was of a different kind, and B., without returning the bag, sent back the contents, which M. refused to receive. *Held*, that B. could not partially rescind the contract, and that a custom in such cases to return the bale found different was inadmissible, the bag not having been returned. But that B., on proving a warranty and breach, could recoup the difference between the actual value and the value if it had corresponded to the warranty. *Morse v. Brackett*, 98 *Mass.* 205.

12. Rescission of Contract.—To rescind a contract for the sale of a chattel, the property must be returned, unless it be valueless to both parties. (23 *Pick.* 283; *Christy v. Cummins*, 3 *McLean*, 386;

Henckley v. Hendrickson, 5 *Id.* 170; *Garland v. Bowling*, *Hempst.* 710.) To constitute an actual rescission of the contract, a re-delivering of the goods is necessary. *Miller v. Smith*, 1 *Mass.* 437.

13. Ship and Cargo, Delivery of.—If the delivery of a ship and cargo be made within a reasonable time after reaching port, the sale is good as against creditors and subsequent purchasers. *Joy v. Sears*, 9 *Peck.* 4; *Portland Bank v. Stacey*, 4 *Mass.* 661; *Buffington v. Curtis*, 15 *Id.* 528.

14. Sales Defined.—A contract to deliver twenty sheep in four years for ten delivered now, is a sale, and not a bailment. (7 *N.Y.* 433; *Bartlett v. Wheeler*, 44 *Barb.* 162.) The distinction between a sale and an exchange explained, (*Preston v. Keene*, 14 *Pet.* 133.) The delivery, by a debtor to his creditor, of property, the value of which was to be applied upon the debt in good faith, is a sale. If a standard or criterion is agreed upon by which the value should be fixed, and the amount realized by that criterion was the amount to be applied in part satisfaction of the debt, that is fixing the price sufficiently to make the sale valid. *Dixon v. Buck*, 42 *Barb.* 70.

15. Statute of Frauds.—Every contract for the sale of any goods, chattels, or things in action, for the price of two hundred dollars or more, shall be void, unless: *First*, A note or memorandum be made in writing, subscribed by the parties; *Second*, Unless the buyer shall receive some part of the goods; or, *Third*, Unless the buyer shall pay some part of the purchase money. (*Gen. Laws of Cal.* ¶ 3,157; 2 *Rev. Stat. of N.Y.* 1,363;) the amount there being fifty dollars, and over. In determining whether the Statute of Frauds applied to a sale of goods, delivered to one person at the request of another, the true test is whether there is any liability of the vendee to the vendor; for if there is, then the promise of the guarantor is collateral, and must be in writing. Where the sale was entered on the vendor's books, as "sold A. B.; C. D. security," and the bill was made out thus: "A. B. (through C. D.) bought," etc., and it was shown that the vendors had urged C. D. to get security from A. B., and offered to pay him for so doing: *Held*, that C. D. could not be regarded as the principal debtor. *Kead v. Ladd*, 1 *Edm.* 100.

16. Stoppage in Transitu.—This is a right which the vendor, in goods sold upon credit, has to recall them or retake them, upon the discovery of the insolvency of the vendee, before the goods have come

into his possession, or any third party has acquired *bona fide* rights in them. And it continues so long as the carrier remains in the possession and control of the goods, or until there has been an actual or constructive delivery to the vendee, or some third person has acquired a *bona fide* right to them. (*Jones v. Earl*, *Cal. Sup. Ct.*, *Jul. T.*, 1869.) A consignor of property *in transitu* has a right to direct a change in its destination, and its delivery to a different consignee. (*Strahorn v. Union Stock Yard, etc., Co.*, 43 *Ill.* 424.) A vendor who had constructively delivered iron lying at his furnace, by pointing it out to the vendee and charging it to him in his books, receiving the vendee's notes for the same, may retain the same for the price, if, while it is still in his custody, and said notes are unpaid, the vendee becomes insolvent. *Thompson v. Baltimore and Ohio R.R. Co.*, 28 *Md.* 396.

17. Tender.—The refusal of a buyer to take the goods which he has contracted to buy, dispenses with any necessity on the part of the seller to make a tender of them. (*Calhoun v. Vechio*, 3 *Wash. C. Ct.* 165.) Under a contract for the sale and delivery of oats "within thirty days," the obligation to receive is as strong as the obligation to deliver. And the contractor is not bound to deliver after the contract has expired, but if he does it will be at the contract price. (*Gibbons v. United States*, 2 *Ct. of Cla. R. (Nott. & H.)* 421.) A complaint on a contract in which the defendant agrees to purchase a given quantity of hay, then in a stack, from the plaintiff, and pay a fixed sum therefor at a fixed time, and the hay to be weighed at the stack, should aver, if the hay has not all been delivered, a readiness or offer on the part of the plaintiff to deliver. (*Barron v. Frink*, 30 *Cal.* 486.) Before an action can be maintained for defendant's failure to accept and pay for property which he agreed to purchase at a future time, a tender of the property and demand of payment must be made. (*Hagar v. King*, 38 *Barb.* 200.) A tender of warehouse receipts for grain issued by responsible parties is a sufficient tender of the grain, in Chicago, unless objected to by the other party at the time. *McPherson v. Gale*, 40 *Ill.* 368.

18. Tender Waived.—After a sale, at buyer's option, within a certain time, notice by the buyer before the time has expired that he will not accept goods within or at the end of such time, waives a tender by the seller. *McPherson v. Walker*, 40 *Ill.* 371; see *White v. Dobson*, 17 *Grat. (Va.)* 262; *Millingar v. Daly*, 56 *Penn. St.* 245.

19. Tender and Demand.—Under a contract for the purchase

of goods, where the right of property is not passed by the contract, the buyer is not bound to accept the articles when tendered, unless they correspond in quantity with what was bargained for. (*Add. on Contr.* 238; *Reimers v. Ridner*, 17 *Abb. Pr.* 292.) The contract is entire, and calls for an entire performance. 18 *Wend.* 258; 17 *N.Y.* 173; *Catlin v. Tobias*, 26 *N.Y.* 217.

20. Valid Sale.—To constitute a valid sale of a chattel, so as to change the property therein, an agreement as to price and delivery of the chattel is requisite, except in case of a vessel at sea, when the transfer is effected by the bill of sale. (*Harper v. Dougherty*, 2 *Cranch C. Ct.* 284.) And also of growing crops. (See *Ante*, Notes 5–8.) A valid sale may be made of personal goods which are out of possession, and the sale will be of the thing itself, and not of a chose in action. The “*Sarah Ann*,” 2 *Sumn.* 206.

21. Void Sale.—A sale in violation of a statutory prohibition, is void, and no action can be maintained upon it. So of a sale contravening a license law. (*Best v. Bander*, 29 *How. Pr.* 489.) When the *substance* of the thing sold is not in existence at the time of the sale, such sale is void. *Bertram v. Lyon*, 1 *McAll.* 53; affirmed, 20 *How. U.S.* 150.

No. 289.

ii. *The Same—on Contract made by Broker.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., the plaintiffs and defendants entered into an agreement, by the hand of A. B., a broker duly authorized to make the same, both on behalf of the plaintiffs and of the defendants, of which the following is a copy: [*Copy it.*]

II. That at the time of making said contract, the defendants paid to the plaintiffs the sum of dollars stated therein.

III. That the plaintiffs were at all times, within said days, ready and willing to comply with the terms of said contract on their part, and within the days mentioned in said contract, to wit, on the day of, 187., at, they tendered the said property to the defendants, and demanded payment of the balance of the price thereof.

IV. That the defendants refused to receive said property, or pay the balance of the price therefor.

V. That they have not paid the same.

[*Demand of Judgment.*]

22. Acceptance.—There must be an acceptance, as well as a delivery, to take the thing out of the statute; but the acceptance may be by agent of the buyer. (*Outwater v. Dodge*, 6 *Wend.* 397.) But the acceptance of a mere shop-boy is not sufficient. (*Smith v. Mason*, *Anth. N.P.* 225.) An acceptance of goods bearing a name different from the one used in the sale note, by a sub-vendee of part of goods sold, does not conclude the vendee as to the whole contract. *Flint v. Lyon*, 4 *Cal.* 17.

No. 290.

iii. *The Same—On Promise to Pay by a Good Bill of Exchange.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant mutually agreed with each other as follows: The plaintiff agreed to sell and deliver to the defendant forty tons of iron, at the price of per hundredweight, on the day of, 187., at, and the defendant then

promised the plaintiff to pay him for said iron, by a bill of exchange at three months' date, on delivery of said iron, and that such bill should be satisfactory to the plaintiff.

II. That afterwards, on the day of, 187., at, the plaintiff delivered the said quantity of iron to the defendant, upon the terms aforesaid, amounting to dollars.

III. That the plaintiff, on the day of, 187., at, demanded of the defendant payment of the price of the said iron, by such bill of exchange, and was then, and has been since, always ready and willing to take the same.

IV. That the defendant has not paid the plaintiff the price of the iron, by a bill of exchange payable in three months from the date thereof, which was satisfactory to the plaintiff, or otherwise, according to said agreement.

[*Demand of Judgment.*]

No. 291.

iv. *The Same—For not Returning Goods, or Paying for them in a Reasonable Time.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff, at the request of the defendant, delivered to him [*describe the property*], of the value of dollars, upon the condition and consideration that the defendant would purchase the same for dollars, or return the same to the plaintiff

within a reasonable time, which the defendant then and there agreed to do.

II. That the plaintiff duly performed all the conditions of said agreement on his part.

III. That a reasonable time for the defendant to purchase and pay for said goods, or to return the same to the plaintiff, has elapsed before the commencement of this action.

IV. That the defendant has not purchased said goods or paid for them, nor has he returned the same to the plaintiff.

[*Demand of Judgment.*]

23. Alternative.—A contract in the alternative should be so set forth. (*Hatch v. Adams*, 8 *Cow.* 35; *Stone v. Knowlton*, 3 *Wend.* 374; *People v. Tilton*, 13 *Id.* 597.) And an averment of demand of one of two things, when the option of the defendant was in the alternative, is not sufficient. *Lutweller v. Linnell*, 12 *Barb.* 512.

No. 292.

v. *The Same*—for not Giving Security According to the Conditions of the Sale at Public Auction, the Credit not having Expired.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff caused to be put up and exposed to sale by public auction, in lots, certain goods and chattels, one of the said lots being a certain carriage, subject to the following terms, to wit: that the highest bidder should be the purchaser, and that the purchaser should be allowed seven months' credit for the pay-

ment of the price, after giving such security as should be approved of by A.B. on the part of the plaintiff; or that such purchaser should, at his election, pay down the purchase price at the time of the sale, and in that event that per cent. should be deducted, by way of discount, from the amount of the purchase money, of all of which said terms the defendant, at the time of the sale, had notice.

II. That at the said sale the defendant was the highest bidder for, and was declared to be the purchaser of the said carriage, subject to the said terms of sale, for dollars.

III. That the plaintiff then delivered the carriage to the defendant, as such purchaser, and was then, and has since been, always ready and willing to perform the said contract on his part.

IV. That the defendant has not, although then requested by the plaintiffs, paid any part of the said sum of dollars, nor has he given any security for the same, according to the said terms of sale.

[*Demand of Judgment.*]

No. 293.

vi. *For a Deficiency on a Resale.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, he put up at auction, at the auction house of, City of, in this State, sundry [articles of merchandise], subject to the condition that all goods

not paid for and removed by the purchaser thereof within [ten days] after the sale, should be resold at auction on his account, of which condition the defendant had notice.

II. That the defendant purchased [two hundred barrels of flour] at the said auction, at the price of dollars.

III. That the plaintiff was ready and willing to deliver the same to defendant on the said day, and for [ten days] thereafter, and on [*etc.*], offered to do so, and demanded payment therefor.

IV. That the defendant did not take away nor otherwise receive the said goods purchased by him, nor pay for them or any of them within [ten days] after the sale, nor afterward.

V. That on the day of, 187., at, having first given the defendant reasonable notice of the time and place of resale, the plaintiff resold the said [two hundred barrels of flour], on account of the defendant, by public auction, for dollars.

VI. That the expenses attendant upon such resale amounted to dollars.

VII. That defendant has not paid the deficiency thus arising, amounting to dollars.

[*Demand of Judgment.*]

24. Conditional Sales.—A vendor of goods, which he delivers, but the title in which is to remain in him until they are paid for, may recover them in the hands of a *bona fide* purchaser from the vendee. (Parmlee v. Catherwood, 36 Mo. 479.) In a conditional sale, the right of the seller to take possession after a default, and sell the property, may

be defeated by performance or an offer or tender of performance by the purchaser, and a sufficient tender gives the buyer a right to the property. (*Hutchings v. Munger*, 41 *Barb.* 396; *Miller v. Steen*, 30 *Cal.* 403; cited in *S.C.*, 34 *Cal.*, 144.) So, he may recover the value of the goods, less the amount of purchase money unpaid at the time of the tender, and the necessary expenses of the vendor in removing and taking care of it. *Miller v. Steen*, 34 *Cal.* 144.

25. Rights of Vendor.—If the vendor, upon default of the vendee, may at his option rescind the contract, he may take possession and resell the property; but this involves no forfeiture of the amount already paid. (*Miller v. Steen*, 30 *Cal.* 407.) The seller becomes, on refusal to accept, the agent of the buyer, with power to sell. *Sands v. Taylor*, 5 *Johns.* 395.

26. Right of Resale.—Where the buyer wrongfully refuses to receive and pay for the goods sold, the seller has the right, as soon as he can with due regard to the interest of the buyer, and after giving him notice of his *intention to resell*, to sell the goods, and to recover the difference, between the agreed price and the sum realized at the sale, together with expenses, from the buyer. (2 *Ken's Com.* 504; 1 *Salk.* 113; 6 *Mod.* 162; 3 *Campb.* 426; 9 *Barn. & C.* 145; 4 *Bingh.* 722; 8 *Martin*, 402; 15 *Wend* 493; *Pollen v. Le Roy*, 30 *N.Y.* 549; compare *Healy v. Utley*, 1 *Cow.* 345.) The buyer is not entitled to specific notice of the *time* and *place* of the resale. (*Bogart v. O'Regan*, 1 *E. D. Smith*, 590; 34 *Barb.* 301; this has been disapproved in *Ingram v. Matthiew*, 3 *Mo.* 209.) But he must dispose of the goods in good faith. *Crooks v. Moore*, 1 *Sandf.* 297.

No. 294.

i. *By Manufacturer, for Goods made at Defendant's Request, and not Accepted.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on day of, 187., at, the defendant agreed with the plaintiff, that the plaintiff should make for him [ten casks], and that defendant

should receive for the same, upon delivery thereof,
 dollars.

II. That the plaintiff made the said casks, and on the
 day of, 187., offered to deliver the same
 to defendant, and has ever since been ready and willing
 to do so.

III. That defendant has not paid for the same.

[*Demand of Judgment.*]

27. Breach of Contract.—If one contracts to make merchantable lumber for another, and the other takes away unmerchantable lumber, contrary to the wish and orders of the maker, this is not a breach of the contract on the part of the maker. *Hale v. Trout*, 35 *Cal.* 229.

28. Manufacturing Goods.—A contract to deliver goods to be manufactured by the party agreeing to deliver, is not an agreement for the sale of goods, within the statute. (*Crookshank v. Burrell*, 18 *Johns.* 58; *Sewall v. Fitch*, 8 *Cow.* 215; *Courtwright v. Stewart*, 10 *Barb.* 455; *Donavan v. Wilson*, 26 *Id.* 138; *Parker v. Schenck*, 28 *Id.* 38; *Robertson v. Vaughn*, 5 *Sandf.* 1.) So, flour contracted to be manufactured and delivered, is not within the statute. *Bronson v. Wiman*, 10 *Barb.* 406.

29. Causes of Action.—Where the person ordering the goods refuses to take them when made, it has been held that the maker may deliver to a third party, with notice to the defendant, and sue for goods sold; (*Bement v. Smith*, 15 *Wend.* 493;) or he may sue on the contract for damages for its breach; or he may sue for work done and materials furnished. *Cooper v. Elston*, 7 *T. R.* 14; *Rondeau v. Wyatt*, 2 *H. Blackst.* 63; *Sewall v. Fitch*, 8 *Cow.* 215; *Prince v. Down*, 2 *E.D. Smith*, 525.

30. Materials Found.—It has been held, that the plaintiff cannot, on an account for goods sold, recover merely upon proof of materials found by him, and used in services rendered. *Collerell v. Appsey*, 6 *Taunt.* 322.

31. Title to Property.—Where the plaintiff sold a number of bales

of drillings to A., for the purpose of making sacks, deliverable to A. as fast as he needed them for manufacturing, and A. agreed to store the sacks as fast as made, subject to plaintiff's order, with the privilege of retaking them as fast as he should pay: *Held*, that the title rested in A., and plaintiff had no lien thereon, or on the sacks, until delivered to him. *Hewlett v. Flint*, 7 Cal. 264.

No. 295.

- i. *For Breach of Promise, by Purchaser of Good Will, not to Carry on Rival Trade.*

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore the defendant carried on the business of, at; and on or about the day of, 187., in consideration that the plaintiff would purchase from him his store, and goods therein, for the sum of dollars, and the good will of the said business for the sum of dollars, the defendant agreed with the plaintiff that he would not at any time thereafter, by himself, or partner, or agent, or otherwise, either directly or indirectly, set up or carry on the business of a, at, or at any other place within the City of

II. That the plaintiff accordingly purchased from the defendant his said, for the price and at the terms aforesaid, and paid said sum of dollars for the said store and goods, and the good will of said business.

III. That the plaintiff duly performed all the conditions of said agreement on his part.

IV. That the defendant afterwards, to wit, on the day of, 187., set up and carried on the business of, at

[*Demand of Judgment.*]

32. Notice.—That the defendant had notice that the plaintiff was thus engaged in the business need not be alleged. *Tallis v. Tallis*, 1 *El. & Bl.* 397.

33. Acceptance.—The acceptance of the property precludes an action by the buyer against the seller, for damages, on the ground that the articles actually furnished do not correspond with the contract. (*Reed v. Randall*, 29 *N.Y.* 358; *Fitch v. Carpenter*, 43 *Barb.* 40.) The buyer, by retaining the property without notice to the seller, waives all remedy upon the contract for any breach of an obligation implied by law, *e.g.*, the obligation to deliver an article of merchantable quality. 1 *Campb.* 190; 4 *Est.* 95; 1 *Carr. & P.* 15; 20 *Wend.* 61; 5 *N.Y.* 73; 2 *Sandf.* 262; 23 *Wend.* 350; 1 *Stark.* 477; 2 *Kent*, 480; *Pars. on Cont.* 475; *Reed v. Randall*, 29 *N.Y.* 358.

34. Agent, Purchase from.—An allegation that the goods were purchased of A., the agent, then and there acting for defendant, is sufficiently certain to prevent any misapprehension of its meaning, and is the same as if the allegation was of the purchase from defendant. *Cochrane v. Goodman*, 3 *Cal.* 245.

No. 296.

ii. *Buyer against Seller, for not Delivering Goods Sold.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred sacks of potatoes] to the plaintiff [on the day of, 187.], and that the plaintiff should pay therefor dollars on delivery.

II. That on the said day, the plaintiff was ready and willing, and offered to pay the defendant the said sum, upon delivery of the said goods.

III. That the defendant has not delivered them.

[Demand of Judgment.]

35. Assignee.—Where plaintiff contracted for the delivery of a quantity of lumber after a certain time, and on three days' notice, and assigned the contract to another, the delivery and payment were concurrent acts. (*Fruit v. Phelps*, 4 *Cal.* 282.) In case of an assignment by the buyer, the demand of performance of a condition precedent on the part of the vendor must be made upon the vendor, and not alone upon the assignor. (*Dustan v. McAndrew*, 10 *Bosw.* 130.) Where a party who has purchased goods by fraudulent representations, assigns them in payment of a pre-existing debt to one who takes them *bona fide*, without notice of the fraud, the latter acquires a good title as against the original vendor. *Butters v. Haughwout*, 42 *Ill.* 18; *Booraem v. Wells*, 4 *C. E. Green*, 87; where there was no question about the consideration.

36. Condition Precedent.—Where defendants stipulated to sell plaintiff certain merchandise "shipped" from Batavia, and the parties agreed that the contract should be binding until the arrival of the ship; its arrival is a condition precedent, which must be shown before either party can maintain an action. *Middleton v. Ballingall*, 1 *Cal.* 446; *Russell v. Nicoll*, 3 *Wend.* 112; *Shields v. Pettie*, 4 *N.Y.* 122; *Benedict v. Field*, 16 *N.Y.* 595.

37. Customers Ordering Goods.—Under a usage of defendants in their business to fill orders in the order of their receipt, customers are not entitled to damages because their orders were not filled in season. *New England Screw Co. v. Bliven*, 38 *Hunt's Mer. Mag.* 582.

33. Damage.—In an action for not delivering the thing sold, the measure of damages is the value at the time of the breach. *Hopkins v. Lee*, 6 *Wheat.* 109; *Blydenburgh v. Welsh*, *Bald.* 331; *Shepherd v. Hampton*, 3 *Wheat.* 200.

39. Delivery—Time.—If a contract or order under which goods are to be furnished does not specify any time at which they are to be delivered, the law implies a contract that they should be delivered in a reasonable time; and no evidence will be admissible to prove a specific time at which they were to be delivered, for that would be to contradict and vary the legal interpretation of the instrument. 3 *Mees. & W.* 445; *Cocker v. Franklin Mfg. Co.*, 3 *Sumn.* 530; see *Terwilliger v. Knapp*, 2 *E. D. Smith*, 86.

40. Demand, Averment of.—A complaint, alleging that the defendant sold to plaintiffs a certain share of fruit growing in an

orchard, and after the sale executed a guaranty that the share of plaintiffs should be at their disposal, and further alleging a demand for the same and the refusal of the defendant to deliver, is demurrable, as it should have contained an assignment of the breach of the contract or guaranty. (*Dabovich v. Emeric*, 7 *Cal.* 209.) The true point at issue is, whether the defendant undertook to deliver. From the nature of the sale it operated as a delivery. There was no necessity of a demand on defendant, unless for the purpose of enabling him to comply with his guaranty. *Id.*

41. Executory Agreements.—Executory agreements for the sale of goods are within the Statute, as well as other contracts. (*Bennett v. Hill*, 10 *Johns.* 364.) A contract for the sale and delivery, if so completed as to be valid in the state where made, will be enforced in this State (Missouri). *Houghtaling v. Ball*, 20 *Mo.* 563.

42. Memorandum.—An agreement of sale signed only by the seller, but delivered to and accepted by the buyer, will sustain the buyer's action for non-delivery. (*Roget v. Merritt*, 2 *Cal.* 117.) The memorandum of a clerk of the seller, of sales by him at auction, is sufficient to bind the purchaser. (*Frost v. Hill*, 3 *Wend.* 386.) The memorandum required of a contract of sale is not binding upon the seller, unless signed by the buyer also. See *Justice v. Lang*, 30 *How. Pr.* 425.

43. Offer to Perform.—The averments in a declaration that the "plaintiff was ready and willing" to receive goods, and pay for them on delivery and shipment, is a material one, and necessary to be proved *Robinson v. Tyson*, 46 *Penn.* 286.

44. Several Causes of Action.—A complaint which states the facts of the case in ordinary and concise language is not demurrable, because such statement shows that the plaintiff is entitled to recover upon two different legal grounds. (*Mills v. Barney*, 22 *Cal.* 240.) But it has been held that the purchaser of a chattel cannot in the same action seek delivery of possession of it, and damages for the non-delivery; the one being an action for a *tort*, the other upon contract. *Furniss v. Brown*, 8 *How. Pr.* 59; *Maxwell v. Farnam*, 7 *Id.* 236.

45. Tender.—Where a party contracts for a quantity of wheat, to be delivered on demand, and paid for on delivery, in action for non-delivery it is unnecessary for plaintiffs to aver and prove a tender of the

purchase money at the time of demand or before suit. *Crosby v. Watkins*, 12 *Cal.* 85.

46. Warehouseman.—A complaint against a warehouseman, which does not allege that the goods belonged to the plaintiff, or that defendant was under an obligation to deliver them to him, is bad. *Thurber v. Jones*, 14 *Wis.* 16.

No. 297.

iii. *The Same—For not Delivering within a Specified Time.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff agreed with the defendant to buy of him, and the defendant then agreed to sell to the plaintiff, and to deliver to him, on the day of, 187., at, bushels of oats, at the price of cents per bushel, to be paid for on the delivery thereof.

II. That the said time for the delivery of the said oats has elapsed, and that plaintiff has always been ready and willing to receive the said oats, and to pay for them, at the price aforesaid, on delivery.

III. That the defendant has not delivered the same, nor any part thereof, to the plaintiff, at, or elsewhere.

IV. That the plaintiff has thereby lost profits, and has sustained damage, to the amount of dollars.

[*Demand of Judgment.*]

47. Tender of Performance.—A tender of performance will

be necessary in contracts for the purchase of a thing at a future day named, and at a specified price, and an averment of readiness and willingness will not suffice. *Lester v. Jewett*, 11 *N.F.* 453; *Smith v. Wright*, 1 *Abb. Pr.* 243; 5 *Sandf.* 113; compare *Coonley v. Anderson*, 1 *Hill*, 519.

48. Allegation where neither Time nor Place of Delivery were Fixed.—That on the day of, 187, at, the plaintiff was ready and willing, and offered to receive and pay for said flour, and otherwise has duly performed all the conditions thereof on his part.

49. Offer and Tender.—In actions on a contract where neither time nor place of delivery were fixed, the plaintiff must aver an offer or tender of performance on his part; (*Lester v. Jewett*, 1 *Kern.* 453;) and an offer to pay on delivery. (*Smith v. Wright*, 1 *Abb. Pr.* 243.) Where goods are to be delivered at one of the places, at the option of the seller, he is bound to give the buyer notice of the place selected. *Rogers v. Van Hoesen*, 12 *Johns.* 221.

50. Time.—Where no time of payment and no time of delivery are agreed upon, payment and delivery are concurrent acts, and neither can maintain an action without showing a readiness and willingness to perform on his part. *Coler v. Livanston*, 2 *Cal.* 51.

51. Allegation where both Time and Place were fixed.—That the plaintiff was ready at the time and place appointed to receive said, and to pay for the same according to the agreement, and otherwise has duly performed all the conditions of the agreement on his part.

52. Place.—In actions on contracts in which both time and place were fixed, it is sufficient to aver a readiness at the place appointed to receive and to pay. (*Vail v. Rice*, 5 *N.F.* (1 *Seld.*) 155; *Clarke v. Dales*, 20 *Barb.* 42; and see *Dunham v. Pettee*, 8 *N.F.* (4 *Seld.*) 508.) And such an averment is essential. *Clark v. Dales*, 20 *Barb.* 42; see *Bronson v. Gleason*, 7 *Barb.* 472.

53. Tender on Demand.—It need not be alleged that a tender was made upon demand. He must allege that he was ready and willing to pay for the goods, without a tender; (*Coonley v. Anderson*, 1 *Hill*, 519; *Vail v. Rice*, 5 *N.F.* (1 *Seld.*) 155; *Bronson v. Wiman*,

8 *N.Y.* 182; compare *Chapin v. Potter*, 1 *Hill.* 366;) even where plaintiff's obligation depends on an act of the defendant to be done at the same time. (*White v. Demilt*, 2 *Hall*, 405.) Readiness to receive and to pay according to the terms of the agreement, and that defendant had notice of such readiness, is sufficient, without request. (2 *Chitt. Pl.* 327; *Rawson v. Johnson*, 1 *East.* 203.) It is sufficient to aver that he had been at all times ready to receive and to pay. *Porter v. Rose*, 12 *Johns.* 209.

54. Allegation where the Particular Time of Delivery was not Appointed.—That on the day of, 187., at the place appointed, the plaintiff was ready to receive said, and pay for the same, according to the agreement, of which the defendant had notice; and the plaintiff has otherwise duly performed all the conditions thereof on his part. On a contract to deliver "on or about" a certain day, the seller has a reasonable time after the day to deliver. *Ripp v. Wiles*, 3 *Sandf.* 585.

No. 298.

iv. Allegation of Part Payment.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, it was mutually agreed between the plaintiff and the defendant that the defendant should sell and deliver to the plaintiff, at, on or before the day of, 187., [*describe the thing,*] and that the plaintiff should pay to the defendant therefor at the rate of dollars per, amounting to dollars, payable as follows: dollars at the time of making said agreement, and the residue on the delivery of the, as aforesaid.

II. That the plaintiff at the time of the contract paid to the defendant the sum of dollars, in pursuance of the agreement.

[Demand of Judgment.]

55. Payment.—The giving of a promissory note, upon a purchase of goods, is not a sufficient payment to take the contract of sale out of the Statute of Frauds. (10 *Barb.* 574; *Ireland v. Johnson*, 18 *Abb. Pr.* 392.) Part payment, to take the contract of sale out of the statute, must be made at the very time of making the contract. A payment the next day, though accepted on account, will not suffice. 20 *Wend.* 61; *Bissell v. Balcom*, 40 *Barb.* 98; *Allen v. Aguirre*, 5 *N.Y. Leg. Obs.* 380.

56. Rescission by Vendor.—To enable the vendor to rescind the sale, he must offer to return the notes given for the goods. (*Coghill v. Bornig*, 15 *Cal.* 213.) If the contract be rescinded, the vendee is entitled to recover the money paid. If the contract is not rescinded, the vendees are entitled to possession on payment of the full amount due. (*Miller v. Steen*, 30 *Cal.* 407.) The party rescinding must put the other party in *statu quo*. (*Miller v. Steen*, 30 *Cal.* 407.) Where A. has made a payment in advance on a contract to purchase stock of B., which B. refuses or fails to deliver, and A. notifies B. that he claims the right to rescind the contract, and claims repayment of the money paid; the notice does not affect his right to maintain an action for damages on the contract. *Jones v. Post*, 6 *Cal.* 102.

No. 299.

v. *Against Seller of Stock, for Non-Delivery.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at the plaintiff and defendant entered into an agreement subscribed by them, whereby it was mutually agreed between them, that the defendant should sell and deliver to the plaintiff, at such time within days thereafter as the plaintiff should elect; shares of the capital stock of the Company, and that the plaintiff should pay him therefor dollars.

II. That on the day of, 187., at, the plaintiff tendered to the defendant said sum of dollars, and otherwise duly performed all the conditions of said agreement on his part, and demanded of the defendant that he deliver said shares of stock to the plaintiff:

III. That the defendant has not delivered the same.

[*Demand of Judgment.*]

57. Law of Place.—If a contract for the sale and assignment of certificates of stock of a corporation is entered into in another state, but the certificates are afterwards delivered in this State, the legality of the sale and assignment is to be tested by the laws of this State. *Dow v. Gould & Curry S. M. Co.*, 31 *Cal.* 241.

CHAPTER VIII.

FOR SALE OF REAL PROPERTY.

No. 300.

i. *Purchaser against Vendor, for Breach of Agreement to Convey.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant entered into an agreement, under their hands and seals, of which a copy is hereto annexed, marked "Exhibit A."

II. That on the day of, 187., the

plaintiff demanded the conveyance of the said property from the defendant, and tendered [..... dollars] to the defendant [*or* was ready and willing, and offered to the defendant to pay dollars, and duly to perform all his agreements under the said covenants, upon the like performance by the defendants.]

III. That on the day of, 187., the plaintiff again demanded such conveyance [*or* that the defendant refused to execute the same].

IV. That the defendant has not executed any conveyance of the said property to the plaintiff.

[*Or* IV. That there is a mortgage upon the said property, made by, to, for dollars, recorded in the Office of, on the day of, 187., and still unsatisfied of record; *or any other defect of title.*]

[*Demand of Judgment.*]

[*Copy of Agreement Annexed.*]

1. Demand and Refusal.—It has been held to be necessary either to tender a deed for signature, or to wait a reasonable time for its preparation by the vendor, and make a second demand. (*Luttweller v. Linnell*, 12 *Barb.* 512; *Connolly v. Pierce*, 7 *Wend.* 130; *Hackett v. Huson*, 3 *Wend.* 250; *Fuller v. Hubbard*, 6 *Cov.* 17; see, however, *Pearsoll v. Frazer*, 14 *Barb.* 564;) where it is asserted that the above rule is a rule of evidence merely, and need not be set forth specially. As to cases in which a demand is necessary, see (*Bruce v. Tilson*, 25 *N.F.* 194.) But if the vendor, on the first demand, positively refuse to convey, nothing more need be done. (*Carpenter v. Brown*, 6 *Barb.* 147; *Driggs v. Dwight*, 17 *Wend.* 74.) That an averment of demand and tender is necessary, see *Beecher v. Conratt*, 13 *N.F.* 110; *Lester v. Jewett*, 11 *N.F.* 453.

2. Description of Property.—He who sells property on a

description given by himself, is bound in equity to make good that description; and if it be erroneous in a material point, although the variance be occasioned by mistake, he must still remain liable for that variance. *McFerran v. Taylor*, 3 *Cranch*, 270.

3. Interpretation of Contract.—In Iowa, the law will construe a contract to be a mortgage, rather than a conditional sale; still the intention of the parties to the contract is the true test. *Hughes v. Sheaff*, 19 *Iowa*, 335.

4. Performance of Conditions.—Where A. sold a lot of land to B. and delivered possession, and in a written contract respecting the same it was stipulated, among other things, that in the event that B. should be dispossessed by legal judgment at any time within three years, A. should pay back to B. \$2,000; and should suit be brought against B. for the lot, then B. should notify A. of it, in order to enable him to assist in the defense of the title: *Held*, that the giving of the notice by B. to A. of the institution of suit against B. for the lot, was indispensable to enable B. to recover of A. on such contract. (*Bensley v. Atwill*, 12 *Cal.* 231.) In a suit on such contract, B. should aver that he had been evicted after notice to A. The payment of the money is dependent on this fact. *Id.*

5. Performance—Averment of Excuse for Non-Performance.—That on the day of, 187., at, and before the time for performance had arrived, the defendant falsely and fraudulently represented to the plaintiff that he had sold said to other persons; and that relying on said representations, and solely by reason thereof, the plaintiff was not prepared to receive and pay for the same, as he otherwise would have done. *Crandall v. Clark*, 7 *Barb.* 169; and *Clarke v. Crandall*, 27 *Id.* 73.

6. Sale "in Writing."—The party making an allegation in a pleading, that the sale of a mining claim, under which he claims title, was in writing, is not thereby precluded from proving that the sale was a verbal one. *Patterson v. Keystone Mining Co.*, 30 *Cal.* 360.

No. 301.

- ii. *The Same—for Damage for not Executing Conveyance, and for Repayment of Purchase Money.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant entered into an agreement under their hands and seals, of which a copy is hereto annexed, marked "Exhibit A."

[Or I. That on the day of, 187., at, the defendant agreed with the plaintiff, that in consideration of the sum of dollars, the receipt whereof was acknowledged by the defendant in said agreement, in part payment, and of the further sum of dollars, for which defendant agreed to take a note secured by a mortgage on the premises hereinafter described, said note and mortgage to be payable in one year from the day of, 187., and to bear interest at ten per cent. per annum, the defendant agreed to sell to the plaintiff, and the plaintiff agreed to buy from the defendant, the farm, then the residence of the defendant, in the Town of, County of, and State of, containing acres or thereabouts, for the sum of dollars per acre, and that the defendant would, on the said day of, 187., at the Office, in City, between the hours of o'clock in the morning and o'clock in the evening, on receiving said note and mortgage, execute to the plaintiff a good and sufficient conveyance of the said premises, free from all incumbrances, and he fur-

ther agreed to pay to this plaintiff, on failure of performance, dollars, liquidated damages. And the plaintiff agreed that he would, at the time and place above mentioned, on the execution of said conveyance, make, execute, and deliver to the defendant the note and mortgage aforesaid.]

II. That on the day of, 187., at [*day and place agreed*], the plaintiff demanded the conveyance of the said property from the defendant, and tendered to the defendant a note and mortgage made and executed pursuant to the agreement, and was ready and willing, and offered to the defendant, to make and execute the note and mortgage agreed on, and to deliver the same to the defendant, and duly to perform all his agreements under the said covenant, upon the like performance by the defendant, and otherwise has duly performed all the conditions of said agreement on his part.

III. That on the day of, 187., at, the plaintiff again demanded such conveyance [*or that the defendant refused to execute the same*].

IV. That the defendant has not executed any conveyance of the said property to the plaintiff, nor has he repaid to the plaintiff the said dollars paid by this plaintiff to the defendant in part payment for said property.

[*Demand of Judgment.*]

[*Annex Copy of Agreement, marked "Exhibit A."*]

No. 302.

iv. *Vendor against Purchaser, for Breach of Agreement to Purchase.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, in the County of, and State of, the plaintiff and defendant entered into an agreement, under their hands and seals, of which a copy is hereto annexed, and marked "Exhibit A."

II. That on the day of, 187., at, the plaintiff was the owner in fee simple of the said property and the same was free from all incumbrances, as was made to appear to the defendant], and at said time and place he tendered to the defendant a sufficient deed of conveyance of the same [*or* was ready and willing and offered to convey the same to the defendant by a sufficient deed], on the payment by the defendant of the said sum.

III. That the defendant has not paid the same.

[*Demand of Judgment.*]

[*Annex Copy of Agreement, marked "Exhibit A."*]

7. Admission.—*Assumpsit* for the value of land conveyed by plaintiff to defendant, in consideration of an oral promise by the latter to convey other land worth \$2,000 to the plaintiff, which promise defendant now refuses to perform: *Held*, that defendant's agreement, and the value of the land to have been conveyed by him, might be proved as an admission of the value of the land which he received. *Bassett v. Bassett*, 55 *Me.* 127.

8. Averment of Excuse for Non-Performance.—That on

the day of, 187., and before the time for the plaintiff to perform the conditions thereof on his part, the defendant gave notice in writing to the plaintiff that he had determined not to take the land; and the defendant abandoned the agreement, and ever since wholly failed to perform it, to the plaintiff's damage dollars. (*North v. Pepper*, 21 *Wend.* 636.) A refusal before the time specified, if relied on as an excuse for non-performance, must be alleged to have been addressed to the party alleging. *Traver v. Halsted*, 23 *Wend.* 66.

9. Rescission of Contract.—In order to rescind a contract for the sale of land, on the ground that the vendor cannot perform it, having no title, it is necessary to aver and show an outstanding title in another. *Riddell v. Blake*, 4 *Cal.* 264.

10. Title.—If the true owner conveys the property by any name, the conveyance as between the grantor and grantee will transfer the title. *Fallon v. Kehoe*, *Cal. Sup. Ct., Jul. T.*, 1869; citing *Middleton v. Findla*, 25 *Cal.* 80.

No. 303.

v. The Same—For not Fulfilling Agreement, and for Deficiency on Resale.

[TITLE.]

The plaintiff complains, and alleges:

I. That this plaintiff was the owner of four fifty vara lots, situated in the western addition of the City and County of, to wit: Lots 1, 2, 5 and 6, in Block No.; that he put them up for sale at auction, at the auction rooms of C. D. & Co., No., Street, in the City of, on the day of, 187., and announced before the commencement of the sale, as a part of the terms of sale, that ten per cent. of the purchase money was, on the day of sale, to be paid by the purchaser to the auctioneers, C. D. & Co., and that if any purchaser failed to make such pay-

ment, the lots would be resold, and the purchaser be charged with the deficiency.

II. That at the said sale, A. B., the defendant, bid for and became the purchaser of each and all of the said lots, for the price of dollars gold coin for each lot.

III. That the said defendant did not, on the day of such sale, or at any other time, pay ten per cent., nor any part of the price bid, nor the purchase money, nor any part thereof.

IV. That in consequence of such neglect of payment, and after notice given to the defendant of the time and place when and where the said lots should be resold on his account, and that he would be charged with the deficiency, the said lots were put up to resale, and resold at the price of dollars for each lot, making a deficiency of dollars upon the said four lots.

V. That the defendant has not paid said deficiency.

[*Demand of Judgment.*]

12. Rights of Vendor.—When the property has been resold, the surplus beyond the purchase money due belongs to the vendor. *Gouldin v. Buckelew*, 4 *Cal.* 107.

*No. 304.*vi. *Vendor against Executor of Purchaser.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and the said A. B. entered into a contract in writing, under their respective hands, of which the following is a copy: [*Copy agreement.*]

II. That on the day of, 187., at, the said A. B. died, leaving a last will and testament, by which he devised the said property as follows: [*set forth devise.*]

III. That the defendant was appointed by said will as his executor, and by an order of the Probate Court of the County of, in this State, made on the day of, 187., said will was admitted to probate, and the defendant was then appointed and duly qualified as such executor.

IV. That on the day of, 187., the plaintiff offered to the defendant to convey the premises to him and the said [*other devisees*], and fully to perform said contract on his part, and requested the defendant to pay the money for the same, pursuant to the contract.

V. That the defendant then wholly refused to do so.

VI. That he has not paid the same.

[*Demand of Judgment.*]

No. 305.

vii. *Vendor against Purchaser, for Real Property Contracted to be Sold, but not Conveyed.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant mutually agreed, that the plaintiff should sell to the defendant, and that the defendant should purchase from the plaintiff [the house and lot No., Street], for dollars.

II. That on the day of, 187., at, the plaintiff tendered [*or* was ready and willing, and offered to execute] a sufficient deed of conveyance of the said property to the defendant, on payment of the said sum, and still is ready and willing to execute the same.

III. That the defendant has not paid the said sum.

[*Demand of Judgment.*]

18. Execute.—"Execute" implies delivery. (*Lafayette Ins. Co. v. Rogers*, 3 *Barb.* 495.) It also implies subscription. (*Cheney v. Cook*, 7 *Wis.* 413.) That an allegation of readiness and willingness is necessary, see *Beecher v. Conratt*, 13 *N.Y.* 110.

CHAPTER IX.

UPON UNDERTAKINGS, BONDS, ETC.

No. 306.

i. Short Form—On Undertakings given in Actions.

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., at, the defendant made an undertaking, a copy of which is hereto annexed as a part of this complaint, marked "Exhibit A."

II. That thereafter, at, judgment was duly given in the action therein mentioned against the [plaintiff] therein, for the sum of dollars, no part whereof has been paid.

III. That on the day of, an execution thereon against the property of was issued to the Sheriff of said County, which was, on the day of, 187., returned wholly unsatisfied.

[*Demand of Judgment.*]

[*Annex Copy of Undertaking.*]

1. Breaches and Damages.—Taking all our statutes together, the obvious design was to put an undertaking on the same footing as a bond. (*Canfield v. Bates*, 13 *Cal.* 606.) Special breaches should be assigned in all cases. (*Western Bk. v. Sherwood*, 29 *Barb.* 383.) Where the condition of a bond is to pay the debt of another, the con-

dition operates merely by way of defeasance. A bond should be sued on, setting out breaches and damages. (*Baker v. Cornwall*, 4 *Cal.* 15; *Postmaster General v. Cross*, 4 *Wash. C. Ct.* 326.) It is in general sufficient to allege the breach in the terms of the condition of the bond. (See *Berger v. Williams*, 4 *McLean*, 577.) A declaration on a bond given to prosecute with effect a writ of replevin, where the breach assigned is, "that the suit was not prosecuted with effect," is sufficient. (6 *Harr. & J.* 139; 2 *Gill. & J.* 441; *Gorman v. Lenox*, 15 *Pet.* 115.) The non-payment of a judgment obtained against the administrator, may be assigned as a breach of the condition of such bond. *People v. Dunlap*, 13 *Johns.* 437.

2. Conditions.—Where the bond was not upon the record, and the complaint did not specify the conditions, it was held insufficient. *Woods v. Rainey*, 15 *Mo.* 484; *Woods v. Freeman*, *Id.* 488.

3. Consideration.—Where it appears that the instrument was given in pursuance of a statute requirement, in a form prescribed thereby, and in a case within the statute, those facts constitute a sufficient consideration to support it, though it be without seal, and no further averment of consideration is necessary. (*Slack v. Heath*, 4 *E. D. Smith*, 95; *S.C.*, 1 *Abb. Pr.* 331.) The complaint, by averring that it was sealed, imports a consideration; it is not necessary that it should also show that it was within the statute. *Clark v. Thorp*, 2 *Bosw.* 680.

4. Defective Undertaking.—If an undertaking has been executed to the defendant by a wrong name, the latter has his remedy, and may describe it as given to him, and may show that he was the party intended. (*Morgan v. Thrift*, 2 *Cal.* 563.) Where a mere defective undertaking has been *bona fide* given, and the party will file a good one before the case is submitted, the Court should permit him to do so. *Coulter v. Stark*, 7 *Cal.* 244; *Bryan v. Berry*, *Id.* 130; *Cunningham v. Hopkins*, 8 *Id.* 33.

5. Demand.—Demand upon the principal is necessary. (*Nelson v. Bostwick*, 5 *Hill*, 37.) But a demand upon the defendant is unnecessary. (*Ernst v. Bartle*, 1 *Johns. Cas.* 319.) But if a demand is necessary by the special terms of the undertaking, it should be averred.

6. Description of Instrument.—A complaint, in an action upon a statutory undertaking, which contains no other description of the

instrument than an allegation that it corresponds with the provisions of a certain section of the Practice Act, is defective. The defect, however, being of form rather than of substance, objection to it must be taken by demurrer to the complaint. *Mills v. Gleason*, 21 *Cal.* 274.

7. Execution Averred.—If execution be issued in a county other than that where judgment was rendered, it may be averred as follows: That on, etc., a transcript of said judgment was duly filed in the Office of the Clerk of the District Court of the Judicial District, in the County of, and on the same day an execution thereon was issued to the Sheriff of said County, which has been returned wholly unsatisfied.

8. Justification.—In all cases where an undertaking with sureties is required, the officer taking it shall require the sureties to make affidavit that they are each worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; and when the amount specified in the undertaking exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties. (*Cal. Pr. Act*, § 650.) And the affidavit is sufficient, if it comply with the statute. (*Taaffe v. Rosenthal*, 7 *Cal.* 514.) The fact that the affidavit of justification states that the sureties are worth the amount for which they have become sureties, over and above all their “just” debts and liabilities, instead of over and above “all their debts and liabilities,” does not affect the validity of the bond. (*Dorsey v. Smyth*, 28 *Cal.* 21.) A county judge has no jurisdiction to discharge the sureties on the official bond of a county treasurer, or to approve a new bond. *People v. Evans*, 29 *Cal.* 429.

*No. 307.*ii. *On an Undertaking for Costs of Appeal.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., judgment was rendered by the District Court of the Judicial District, of the City and County of, State aforesaid, in favor of the above-named plaintiffs, against one C. D., for the sum of dollars; and that on the day of, 187., the said C. D. appealed to the Supreme Court of said State from the said judgment.

II. That upon said appeal, the defendants made and filed with the Clerk of said Court, for the use of these plaintiffs, their written undertaking and justification therein, of which the following is a copy: [*Copy undertaking.*]

III. That on the day of, 187., the judgment appealed from was by the said Supreme Court affirmed, and the sum of dollars, costs and damages on the appeal, was awarded against the appellant.

IV. That he has not paid the same.

[*Demand of Judgment.*]

9. Action by Assignee.—To enable the assignee of a judgment to sue on the appeal bond, he must have an assignment of the bond. *Moses v. Thorne*, 6 Cal. 87.

10. Appeal Dismissed.—Where an appeal is taken to the Supreme Court from a judgment, by filing notice of appeal and undertak-

ing, and the appeal is afterwards dismissed by the Supreme Court for failure of the appellant to send up a transcript, the sureties are liable on the undertaking on appeal. (*Ellis v. Hull*, 23 *Cal.* 160.) Where an appeal is withdrawn or dismissed by consent of both parties, without being called to a final hearing, no action can be maintained on the appeal bond. (*Osborn v. Hendrickson*, 6 *Cal.* 175.) Where an appeal is dismissed on motion of respondent, based on written consent of the appellant, the dismissal operates as an affirmance of the judgment, and charges the sureties on the undertaking on appeal. *Chase v. Beraud*, 29 *Cal.* 138.

11. Delivery.—In an action on an undertaking on appeal, it is a sufficient averment of the delivery of the undertaking, if the complaint show that it was filed in the Clerk's office. *Holmes v. Ohm*, 23 *Cal.* 268.

12. Execution, Issue of.—An averment in the complaint in a suit on an appeal bond, that execution had been issued on the judgment and returned unsatisfied, is unnecessary. The non-payment of the judgment can be shown without issuing an execution. *Tissot and Wife v. Darling*, 9 *Cal.* 278.

13. Frivolous Appeal.—Damages for a frivolous appeal cannot be recovered in an action upon the undertaking on appeal, unless they have been specially awarded by the appellate court. *Hathaway v. Davis*, 33 *Cal.* 161.

14. Judgment.—It need not be alleged that the judgment was final. *Southerland v. Phelps*, 22 *Ill.* 91.

15. Judgment Reversed.—Where an appeal bond was conditioned to pay the judgment appealed from, if the same should be affirmed, and it appeared that the judgment appealed from was reversed, the conditions of such bond were not broken, and no action would lie thereon. *Chase v. Ries*, 10 *Cal.* 517.

16. Judgment Affirmed.—Under the usual undertaking on appeal, if the judgment be affirmed, the liability of the surety accrues only after an affirmance upon that appeal of the then existing judgment. An interlocutory order of affirmance, reserving leave to answer and litigate further, followed by new pleadings and a new judgment upon the new issue, does not render the sureties liable. (*Poppenhusen v. Seeley*, 3 *Keyes*, 150.) An undertaking or bond was construed to re-

late only to an action pending against the obligees at the time when it was given. *Beach v. Endress*, 51 *Barb.* 570.

17. Liability of Sureties.—The sureties on an undertaking are entitled to stand on the precise terms of the contract, and there is no way of extending their liability beyond the stipulation to which they have chosen to bind themselves. (*Tarpey v. Schillenberger*, 10 *Cal.* 390.) And a judgment against the principal is conclusive against the surety. (*Pico v. Webster*, 14 *Cal.* 204.) But an undertaking on appeal conditioned for the payment of what the judgment-creditor has no legal right to receive, is not, as to such condition, binding upon the sureties. *Whitney v. Allen*, 21 *Cal.* 233.

18. Made and Filed.—That the averment in the second allegation of the above form, that the defendants made and filed, etc., is sufficient, *Gibbons v. Bernhard*, 3 *Bosw.* 635; but compare *Pevey v. Sleight*, 1 *Wend.* 518.

19. Parties.—Where defendant executed an undertaking on appeal, to husband and wife plaintiffs, an action on the undertaking may be maintained in the name of the husband and wife. *Tissot v. Darling*, 9 *Cal.* 278.

No. 308.

iii. *The Same—For Costs and Damages on an Arrest.*

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore an action was commenced in the District Court of the Judicial District, State aforesaid [*or otherwise state the court*], against this plaintiff, wherein the said A. B. made application to the Hon. C. D., Judge of said Court for an order of arrest against this plaintiff, whereupon the defendants, on the day of, 187., at, executed and filed with the Clerk of said Court, for the benefit of this plaintiff, pursuant to law, a written under-

taking, of which the following is a copy: [*Copy undertaking.*]

II. That thereupon, pursuant to said application and undertaking, an order was made by the Judge of said Court, for the arrest of this plaintiff, and thereby the said A. B. required the Sheriff of County to arrest this plaintiff, and hold him to bail in the sum of dollars.

III. That this plaintiff was, on the day of, 187., arrested by the Sheriff of the, under said order, and was unjustly detained and deprived of his liberty thereunder for the space of days, to his damage dollars.

IV. That such proceedings were afterwards had in said action, that this plaintiff, on the day of, 187., recovered a judgment therein, which was rendered by said Court against the defendant A. B., for dollars.

V. That on the day of, 187., at, this plaintiff demanded payment of said judgment and damages, from the defendant.

VI. That he has not paid the same.

[*Demand of Judgment.*]

No. 309.

iv. *On an Undertaking, on Release from Arrest.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, under an order of arrest duly granted by

A. B., a judge of the Court, against one C. D., in an action brought in the said Court by the plaintiff herein against the said C. D., the said C. D. was arrested by the Sheriff of the County of

II. That on the day of, 187., at, the defendants undertook, in the sum dollars, that the said C. D. should, if released, render himself at all times amenable to the process of the Court during the pendency of the said action, and to such as might be issued to enforce the judgment therein, a copy of which undertaking is hereto annexed, marked "Exhibit A."

III. That thereupon the said C. D. was released.

IV. That on the day of, 187., judgment was rendered for the plaintiff in the said action, for dollars.

V. That on the day of, 187., execution was issued against the property of the said C. D., under the said judgment, but the sheriff has made return that no property was found.

VI. That on the day of, 187., execution was issued against the person of the said C. D., under the said judgment, but the sheriff has made return that he could not be found.

VII. That the said judgment has not been paid.

[*Demand of Judgment.*]

[*Annex Copy of Undertaking, marked "Exhibit A."*]

20. Attachments.—On a bond given by an officer to be relieved from arrest, on an attachment conditioned to appear at the return day, an allegation of non-appearance is sufficient. (*Thomas v. Cameron*,

17 *Wend.* 59; *Hart v. Seixas*, 21 *Id.* 40.) On an attachment for a contempt, the complaint must state plaintiff's connection with the attachment proceedings, and to what extent he was aggrieved by the acts of defendant. (*Rayner v. Clark*, 7 *Barb.* 581.) That the order for the attachment was duly granted, is sufficient. *Cal. Pr. Act*, ¶ 59.

21. Essential Averment.—A complaint on a recognizance in a criminal case should aver that the same was filed in or became a matter of record in the court where it was returnable. *Mendocino County v. Lamar*, 30 *Cal.* 627.

22. Execution must be Averred.—In an action upon an undertaking given to procure a discharge from arrest, the complaint is bad upon demurrer if it omits to aver the issuing and return of an execution against the property of the debtor arrested, and also the issuing and return of an execution against the person. (*Gauntley v. Wheeler*, 31 *How. Pr.* 137.) That execution against property need not be averred, see *Renick v. Orser*, 4 *Bosw.* 384; *Gregory v. Levy*, 12 *Barb.* 610.

23. Execution against the Person.—The averment of the recovery of the judgment, and proceedings thereupon had supplementary to execution, and the issuance of attachment for contempt, under which the instrument sued upon was executed, is sufficient. *Kelly v. McCormick*, 2 *E. D. Smith*, 503.

24. Indictment Found.—Where a bail bond is given to appear and answer an indictment, the complaint must aver that the indictment was found, or is pending. *People v. Smith*, 3 *Cal.* 271.

25. Recognizance.—In an action in the District Court upon a recognizance of bail given under order of the County Judge for the release of a party charged with larceny, the complaint need not aver that the recognizance was certified by the Court of Sessions to the District Court, nor that the principal has not satisfied the judgment of forfeiture. The authorities that such certificate and averment are necessary refer to proceedings by *scire facias* upon a record of the recognizance to which the accused is a party. (*People v. Love*, 19 *Cal.* 676.) The complaint alleged substantially that G. was indicted for gaming and arrested, and the defendant executed the recognizance which is set out; that G. appeared at the first term of the Court thereafter and plead not guilty, and case continued to next term, at which time, the case being

called for trial, G. did not appear, and the defendants, though "called," did not produce his body; that the Court then made an order forfeiting the recognizance, and that defendants did not produce the body of G. before the final adjournment of the Court. Such a complaint states a cause of action. *People v. Smith*, 18 Cal. 498.

No. 310.

v. On an Undertaking for Costs and Damages on Attachment.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore an action was commenced in this Court by the defendant A. B., for the recovery of money, against this plaintiff, wherein the said A. B. made application to the Clerk of the said Court for a writ of attachment against the property of this plaintiff, whereupon the defendant, on the day of, 187., at, executed and filed with the Clerk of said Court, for the benefit of this plaintiff, pursuant to Section one hundred and twenty-two of the Practice Act, a written undertaking, of which the following is a copy: [*Copy of the undertaking.*]

II. That pursuant to said application and undertaking, the Clerk of said Court issued a writ of attachment, directed to the Sheriff of said County, whereby the said Sheriff was required to attach and safely keep sufficient property of this plaintiff to satisfy the demand of the said A. B. in said action, to wit, the sum of dollars, together with costs and expenses.

III. That at the time of the issuing of said attachment, this plaintiff was engaged as a merchant in selling hardware at wholesale, at No., Street, in the City of, in said County. That the sheriff

of said County, pursuant to said writ of attachment, entered said store and removed the property of this plaintiff, and thereby the business of this plaintiff was utterly broken up, and the goods attached became unmarketable and useless, and this plaintiff's credit became thereby greatly injured, to his damage dollars.

IV. That such proceedings were had in the suit aforesaid, that this plaintiff, on the . . . day of, 187., recovered judgment therein, which was rendered by said Court against the said A. B. plaintiff therein, for the sum of dollars, his costs of defending said action.

V. That on the . . . day of, 187., at, this plaintiff demanded payment of the said judgment from said A. B.

VI. That he has not paid the same.

[*Demand of Judgment.*]

26. Principal and Surety.—Where the surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive against the surety. *Pico v. Webster*, 14 Cal. 202.

27. Statute, how Pleaded.—Reference to statute, as in the above form is sufficient. The Court is bound to take notice of a public statute. *Goelet v. Cowdry*, 1 Duer, 132; *Shaw v. Tobias*, 3 Comst. 188.

*No. 311.**vi. On an Undertaking Given to Procure the Discharge of an Attachment.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., an attachment against the property of C. D. was issued out of the Court, by the Clerk thereof, in an action commenced by A. B., the plaintiff herein, against the said C. D., the defendant herein, to recover [*state what*].

II. That afterwards, on the day of, 187., at, the said C.D. appeared in said action, and applied for a discharge of said attachment, and that the defendants herein, E. F. and G. H., thereupon executed and delivered to this plaintiff a written undertaking pursuant to law, a copy of which is hereto annexed and made a part of this complaint, marked "Exhibit A."

III. That upon delivery of said undertaking the said attachment was discharged and the property was released, and that subsequently, on the day of, 187., said plaintiff recovered judgment against the said C. D., which was rendered in said action, for dollars, damages and costs, which judgment was entered and docketed in the Office of the Clerk of County, on the day of, 187., and that said judgment has not been paid.

IV. That on the day of, 187. this

plaintiff demanded of the defendants herein payment of said judgment, which was by each and all of them refused.

V. That they have not paid the same.

[*Demand of Judgment.*]

[*Annex Copy of Undertaking, marked "Exhibit A."*]

28. Consideration.—Where defendant applies to the Court, under Sections one hundred and thirty-six and one hundred and thirty-seven of the Practice Act, for a discharge of the attachment, and an undertaking is executed by D. & R., reciting the fact of the attachment, and that, "in consideration of the premises, and in consideration of the release from attachment of the property attached as above mentioned," they undertake to pay whatever judgment plaintiff may recover, etc., and the Court makes an order discharging the writ and releasing the property: in suit against the sureties of the undertaking, the complaint need not aver that the property was actually released and delivered to the defendant; that as the consideration for the undertaking was the release of the property, and as the complaint avers such release in consequence and in consideration of the undertaking, by order of the Court, which is set out, the actual release and re-delivery of the property to defendant is immaterial, the plaintiff having no claim on it after the undertaking was given and the order of release made. (*McMillan v. Dana*, 18 *Cal.* 339.) The recitals in statutory undertakings given in such cases, have the same effect and are to be construed in the same way as bonds making the same recitals, and are conclusive of the facts stated. *Id.*

29. Form.—For a form of complaint in such cases, consult *Cruyt v. Phillips*, 7 *Abb. Pr.* 205.

30. Issue of Attachment.—It need not be alleged that the attachment was duly issued, if it be shown that it was issued from a court of general jurisdiction. (*Cruyt v. Phillips*, 7 *Abb. Pr.* 205.) And reciting the fact of a levy of the writ, the complaint need not aver or set out the facts which authorized the issuing of the attachment. The recital of the levy estops defendants from denying it, and the levy is

sufficient without averment of the previous proceedings. *McMillan v. Dana*, 18 *Cal.* 339; *Gregory v. Levy*, 12 *Barb.* 610.

31. Released upon Delivery.—The complaint should allege that the property attached was released upon the delivery of the undertaking. (*Williamson v. Blattan*, 9 *Cal.* 500.) A failure to do so is fatal, and the defect may be taken advantage of by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Id.*

32. That Property was Released.—The complaint should state that the property was released upon the execution and delivery of the bond. It is necessary to state the consideration of the undertaking; a mere reference to the condition of the bond itself is insufficient. *Palmer v. Melvin*, 6 *Cal.* 651.

No. 312.

vii. *On an Undertaking Given in Claim and Delivery.*

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore this plaintiff commenced an action in the Court, against A. B., to recover possession of specific personal property.

II. That in the course of said action, such proceedings of claim and delivery under and pursuant to the statute were had, that on the . . . day of, 187., the defendants made and delivered to the sheriff for the use of this plaintiff, pursuant to the statute, their written undertaking, of which the following is a copy: [*Copy of the undertaking.*]

III. That the personal property referred to in said undertaking was delivered [*or released*] to the said A. B., defendant in said action, pursuant to said undertaking, and to a requisition of said A. B., defendant in said action,

made pursuant to law, and said undertaking was thereupon delivered to this plaintiff.

IV. That such proceedings were afterwards had, that on the day of, 187., a verdict in the District Court of the Judicial District, County, was rendered against the said A. B., wherein the value of the said property was found to be dollars, whereupon judgment was rendered against A. B., the defendant therein, that the plaintiff recover possession of said property, or the sum of dollars, in case a delivery could not be had.

V. That the defendant has not returned said property, nor otherwise paid or satisfied said judgment.

VI. [*State demand, where that is necessary.*]

VII. That this plaintiff thereafter caused execution to be issued on said judgment against the said defendant, A. B., which execution has been returned wholly unsatisfied.

VIII. That the defendant has not paid said judgment.

[*Demand of Judgment.*]

33. Action by Assignee.—In an action by the assignee of an undertaking given in proceedings of claim and delivery, it is sufficient, by way of showing the plaintiff's title, to allege that the undertaking was duly assigned, etc., to him, without alleging that the judgment in the action was also assigned. (*Slack v. Heath*, 1 *Abb. Pr.* 331; S.C., 4 *E. D. Smith*, 95; *Morange v. Mudge*, 6 *Abb. Pr.* 243.) When the action is brought by only a portion of the assignees, all the promisees should be represented. (*Bowdoin v. Colman*, 6 *Duer*, 182; 3 *Abb. Pr.* 431.) Where a replevin bond substantially conforms to the act, the assignee of the defendants can maintain an action upon it. *Wingate v. Brooks*, 3 *Cal.* 112.

34. Consideration.—The averment of delivery and release is an

avermert of consideration, and must be stated, even if the undertaking was under seal. (*Nickerson v. Chatterton*, 7 *Cal.* 568.) But if the undertaking recites the performance of the condition, a complaint setting forth the undertaking need not also aver performance. *McMillan v. Dana*, 18 *Cal.* 339.

35. Delivery and Release.—It must be averred that the property was delivered or released. *Palmer v. Melvin*, 6 *Cal.* 651; *Williamson v. Blattan*, 9 *Id.* 500.

36. Demand.—No demand need be averred where judgment was returned unsatisfied. *Bowdoin v. Coleman*, 3 *Abb. Pr.* 431; *Slack v. Heath*, 1 *Id.* 331.

37. Facts Authorizing Issue of Process.—The complaint need not aver that it was taken in pursuance of the statute. It is enough that the instrument set forth is in accordance with the statute. *McMillan v. Dana*, 18 *Cal.* 339; *Shaw v. Tobias*, 3 *N.F.* 188; *Gregory v. Levy*, 12 *Barb.* 610.

38. Interest Awarded.—Upon an undertaking given in an action of claim and delivery, for the payment of a fixed sum, and not conditioned for the return of the goods, interest may be awarded upon the amount of the penalty from the date of judgment in the original action; because after the recovery the sureties are in default, and the neglect to pay puts them in the wrong. *Emerson v. Booth*, 51 *Barb.* 40.

39. Joint Bond.—No recovery can be had on a bond purporting to be a joint bond of the principal and sureties, but signed by the latter only. (*City of Sacramento v. Dunlap*, 14 *Cal.* 421.) Otherwise, as to undertakings under our system. They are original and independent contracts on the part of the sureties, and do not require the signature of the principal. *Id.*

40. Judgment in the Alternative.—The complaint should show that judgment was rendered in the alternative. (*Nickerson v. Chatterton*, 7 *Cal.* 568.) It must be averred that neither had the property been returned, nor the specified value thereof paid. *Id.*

41. Liability of Sureties.—Where the plaintiff, in replevin, gives the statutory undertaking, and takes possession of the property in suit, and is afterwards nonsuited, and judgment entered against him for the return of the property and for costs: *Held*, that his sureties are liable

for damages sustained by defendant by reason of a failure to return the goods, but not for damages for the original taking and detention—the value of the goods not having been found by the jury. *Ginaca v. Atwood*, 8 *Cal.* 446.

42. Reference to Section of Act.—A complaint upon an undertaking given under Section one hundred and two of the Practice Act, which refers only to the section, is sufficient. (*Mills v. Gleason*, *Oct.* 1861.) The material portions of the undertaking should be set forth; but it will be at most only a defect of form. (*Id.*) That such manner of pleading is sufficient, consult *Bowdoin v. Coleman*, 3 *Abb. Pr.* 431; *Slack v. Heath*, 1 *Id.* 331; *Rayner v. Clark*, 7 *Barb.* 581; *Loomis v. Brown*, 16 *Id.* 325; *Gregory v. Levy*, 12 *Id.* 610; *Gould v. Warner*, 3 *Wend.* 54; *Phillips v. Price*, 3 *Maule & S.* 180; 1 *Bos. & P.* 381, n.

43. Value of Property.—The complaint does not state facts sufficient to constitute a cause of action, unless it aver that the value of the property was found by the jury, and that an alternative judgment was rendered, as provided in Section two hundred of the Practice Act. *Clary v. Rolland*, 24 *Cal.* 147.

No. 313.

viii. On an Undertaking Given in Injunction.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., in an action brought by C. D. against this plaintiff, an injunction, issued out of this Court was served on this plaintiff, enjoining him from [*state effect of the injunction*].

II. That upon the issuing of the said injunction the defendants gave an undertaking required by Section [one hundred and fifteen] of the Practice Act [*or by law*], of which the following is a copy: [*Copy of undertaking.*]

III. That such proceedings were had in the said action that it was finally decided by the Court, and thereby adjudged that the said C. D. was not entitled to the said injunction.

IV. That the damages sustained by this plaintiff, by reason of the said injunction, amounted to the sum of dollars, and interest thereon from the day of, which the Court on that day awarded to this plaintiff.

V. That no part thereof has been paid.

[*Demand of Judgment.*]

44. Damages.—Where an officer is enjoined from paying over money in his hands, legal interest only can be recovered, as damages for its detention, in an action on the injunction bond. (*Lally v. Wise*, 28 Cal. 539.) To recover damages for the wrongful issuing of the writ, it was held that the amount paid to counsel as a fee to procure the dissolution of the injunction was properly allowed as part of the damages; (*Thaie v. Quan*, 3 Cal. 216;) though the fee was paid after a certain date, provided the retainer was before that date. *Prader v. Grimm*, 13 Cal. 585.

45. Damages must be Averred.—In the action against the sureties on an injunction bond, the condition of which is, that the plaintiffs in the suit for whom the sureties undertook should pay all damages and costs that should be awarded against the plaintiff by virtue of the issuing of said injunction by any competent court, and the complaint did not aver that any damages had been awarded: *Held*, that such complaint is fatally defective. *Tarpey v. Shillenberger*, 10 Cal. 390.

46. Enjoining Payment of Money.—A sheriff had in his hands money belonging to L., which he had collected on an execution in favor of L. & D., against S. W. & C. commenced an action against M., L., and others, to enjoin M. from paying the money to L., and procured a preliminary injunction, which was served on M. alone, but L. appeared in the action and defended. The injunction bond

ran to all the defendants. *Held*, that L. could maintain an action for damages on the injunction bond. *Lally v. Wise*, 28 *Cal.* 540.

47. Obedience to Injunction.—Mere obedience, upon notice of issuance of injunction, is sufficient, if alleged. *Cumberland Coal and Iron Co. v. Hoffman Steam Coal Co.*, 15 *Abb. Pr.* 78.

48. Service of Injunction.—An allegation that injunction was served imports a legal service. *Loomis v. Brown*, 16 *Barb.* 325.

49. Statement of Trial on Injunction.—It is sufficient to allege that an injunction was granted by a court or judge, that issues were joined and judgment rendered. *Loomis v. Brown*, 16 *Barb.* 325.

50. Who may Join.—All obligees on an injunction bond may join as plaintiffs, whether their several claims be similar or not. *Loomis v. Brown*, 16 *Barb.* 325.

No. 314.

ix. *On a Bond or Undertaking, Condition only Set Forth.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the defendant covenanted with the plaintiff, under his hand and seal, to pay to the plaintiff the sum of [*state the penalty*].

II. That said obligation was upon the express condition thereunder written, that if, etc. [*set forth the words of the condition*], the said obligation was to be void, otherwise to remain in full force.

III. [*Allege breaches, as in other cases.*]

[*Demand of Judgment.*]

51. Breach of Condition—the Basis of the Action.—The breach of the conditions of a penal bond constitutes, in fact, the basis

of the plaintiff's action, and it should be assigned with certainty and particularity, so as to show the injury. (*Campbell v. Strong*, *Hempst.* 265; *Dixon v. United States*, 1 *Brock. Marsh.* 177; *Postmaster-General v. Cross*, 4 *Wash. C. Ct.* 326.) In general, it is sufficient to allege the breach in the terms of the condition of the bond. 6 *Harr. & J.* 139; 2 *Gill. & J.* 441; *Berger v. Williams*, 4 *McLean*, 577; *Gorman v. Lenox*, 15 *Pet.* 115; see Note 55.

52. Demand of Relief.—The demand for relief must be for the penalty. *Western Bank v. Sherwood*, 29 *Barb.* 383; *Mayor, etc., of N.Y. v. Lyons*, 24 *How. Pr.* 280; and see *Syracuse City Bank v. Co-ville*, 19 *Id.* 385.

53. Notice.—Notice to the representative, and a demand upon him, are not always essential. (*People v. Rowland*, 5 *Barb.* 449.) It is not necessary to aver notice to the sureties, nor to state who was the applicant for the order for prosecution. *People v. Falconer*, 2 *Sandf.* 81.

54. Parties.—In an action on a bond or written undertaking, there can be no constructive parties jointly liable with the proper obligors. *Lindsay v. Flint*, 4 *Cal.* 88.

55. Penal Bonds.—In actions on penal bonds, the complaint must specifically assign the breaches for which the action is brought; (*Baker v. Cornwall*, 4 *Cal.* 15; 4 *Johns.* 213; 5 *T.R.* 636; 2 *Cai.* 329; 2 *Wils.* 277; 1 *Saund.* 58; *Id.* 187; 2 *Burr.* 820; 5 *T.R.* 538; 8 *Id.* 126; 2 *Hen. & M.* 446; 1 *Bibb.* 242; *Burnett v. Wylie*, *Hempst.* 147; and see *Hazel v. Waters*, 3 *Cranch C. Ct.* 682; *Western Bank v. Sherwood*, 29 *Barb.* 383;) *e.g.*, on a bond conditioned that a third party shall pay on a certain contingency or on demand, or for an uncertain sum, breaches must be assigned. (*Nelson v. Bostwick*, 5 *Hill*, 37.) Also a bond given on a plea of title before a justice. (*Patterson v. Parker*, 2 *Id.* 598.) But not a bond payable in money by installments. (*Harmon v. Dedrick*, 3 *Barb.* 192; *Spaulding v. Millard*, 17 *Wend.* 331.) Nor to bonds payable in money only, which may be brought under actions on written instruments.

*No. 315.**x. On Arbitration Bond—Refusal to Comply with Award.*

[TITLE.]

The plaintiff complains, and alleges:

I. That in consideration of certain questions in difference between plaintiff and defendant, and of a certain bond executed by this plaintiff to the defendant, the defendant, on the day of, 187., at, made and delivered to the plaintiff an undertaking, conditioned to abide the award of upon said question of difference; a copy of which undertaking is hereto annexed, marked "Exhibit A."

II. That said undertook the arbitration thereof, on the day of, 187., at, and duly published their award in writing upon the matter submitted, and delivered the same to the parties, and thereby awarded that the defendant should [*state terms of the award*], a copy of which award is hereto annexed as a part of this complaint, marked "Exhibit B."

III. That the plaintiff duly performed all the conditions of said bond on his part.

IV. That on the day of, 187, notice of said award was given to the defendant.

V. That the defendant has not [*state the breach*].

[*Demand of Judgment.*]

[*Annex Copies of Exhibits "A" and "B."*]

56. Assignment of Breach for Revoking Arbitrator's Power.—That thereafter, and before the matters aforesaid were finally passed upon by said arbitrator, the defendants, by writing under

their hands and seals, delivered to, revoked the powers of the arbitrators, and notified said that they would not abide by the award of said arbitration.

Where defendant revoked the arbitrator's powers before the submission was actually made a rule of court, the plaintiff should assign the revocation as a breach—not the non-performance of the award. *Frets v. Frets*, 1 *Cow.* 335; *William v. Maden*, 9 *Wend.* 240.

57. Award of Payment at a Future Day.—Where the award directs payment at a future day, and, pursuant to authority given in the submission, requires the debtor to give security for its payment, an action lies upon the arbitration bond, upon the refusal to give security, without waiting till the time of payment. *Bayne v. Morris*, 1 *Wall.* 97.

53. Form.—For authorities upon forms of complaints in such actions, see *Myers v. Dixon*, 2 *Hall*, 456; *McKinstry v. Solomons*, 2 *Johns.* 57; 13 *Id.* 27.

No. 316.

xi. *On a Bond for the Faithful Accounting of an Agent.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, it was agreed between this plaintiff and one A. B., that the said A. B. should solicit and collect subscriptions for a [*state what*], and that the plaintiff should pay to the said A. B. [*state terms of payment*] for such service, and that the said A. B. should faithfully account to this plaintiff for all [*property*] intrusted to him, and should faithfully pay over all moneys collected by him under the authority of said agreement.

II. That in consideration of said agreement, the defendant made and delivered to the plaintiff an undertaking in writing, under his hand and seal, condi-

tioned to the faithful performance by said A. B. of the terms of said agreement on his part; a copy of which undertaking is hereto annexed, marked "Exhibit A."

III. That thereafter the said A. B. did solicit, collect, and receive divers sums of money, in the course of his employment under the aforesaid agreement, which sums he has failed to render up, account for, or pay over to the plaintiff.

IV. That on the day of, 187., at, the plaintiff requested the said A. B. to account for and pay over to this plaintiff such sums, and thereupon demanded payment from him of the same, according to the terms of said undertaking.

V. That no part thereof has been paid.

[*Demand of Judgment.*]

[*Annex Copy of "Exhibit A."*]

59. Request.—Request is a condition precedent in a bond to account on request. *Davis v. Cary*, 15 *Q. B.* 418; *S. C.*, 69 *Eng. Com. L. R.* 416.

60. Sale and Accounting.—A sale must be averred, with a refusal to account therefor. *Wolf v. Suyster*, 1 *Hall*, 140.

No. 317.

xii. *On a Bond for the Fidelity of a Clerk.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant covenanted with the plaintiff, under his hand and seal, that if the said A. B. should not faithfully perform his duties as a clerk to the

plaintiff, or should fail to account to the plaintiff for all moneys, evidences of debt, or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding dollars.

III. That between the day of, 187., and the day of, 187., the said A. B. received moneys and other property, amounting to the value of dollars, for the use of the plaintiff, for which he has not accounted to him.

[*Demand of Judgment.*]

61. Application of Bond.—Such a bond applies to the honesty of the clerk, and not to his ability, and the sureties are not responsible for loss arising from a mere mistake; (*Union Bank v. Clossey*, 10 *Johns.* 271;) unless the clerk conceals deficiencies, and for this purpose makes false entries in the books. *Id.*

62. Consideration.—Appointment to office and its emoluments is a sufficient consideration to support the obligation of sureties for fidelity. *United States v. Linn*, 15 *Pet.* 290.

63. Faithful Discharge of Duties.—In a suit on a bond to secure faithful performance of various duties of secretary and treasurer to a private association, if the defendant, who was a surety, (the principal being dead,) craved oyer of the bond and conditions, and pleaded general performance: *Held* sufficient. (*Jackson v. Rundlett*, 1 *Woodb. & M.* 381.) Where an inhabitant of a town acted as justice of the peace, and gave a bond with sureties for the faithful discharge of his duties as justice, the fact that no law required him to give bond would not affect the validity of the instrument as a common law obligation. *Williamson v. Wolf*, 37 *Ala.* 298.

*No. 318.**On an Official Bond.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant, on the day of, 187., at, made and delivered his bond or writing obligatory, sealed with his seal, of which the following is a copy: [*Copy bond.*]

II. [*Set forth breach.*]

[*Demand of Judgment.*]

64. Allegation of Breach—for Neglect of Sheriff to Levy.—That said sheriff did not execute said process, but although there was then within his county real and personal property of which he might have levied the moneys thereby directed to be levied, he neglected and refused so to do, whereby the plaintiff lost his said debt.

65. Allegation of Breach—for Neglect to Sell after Levy.—That the said sheriff, by virtue thereof, on the day of, levied on the goods of said A. B., of the value of dollars; but he neglected to advertise and sell the goods so lieved on by him as aforesaid, and no part of the moneys directed to be collected on the relator's said execution has been received by the relator. (*People v. Ten Eyck*, 13 *Wend.* 448.) This form may be used where writ was delivered to the deputy. See *Post*, Note 73.

66. Allegation of Breach—for Neglect to Return.—Who by virtue thereof, on the day of, levied on the goods of said A. B., of the value of dollars; but, although more than sixty days elapsed after its delivery to him and before this action, wholly neglected and failed to make return of said execution, and no part of the moneys directed to be collected thereby has been received by the relator.

67. Allegation of Breach of Treasurer's Bond.—That said

treasurer, between the day of, and the day of, received various sums of money, as such treasurer, amounting to about the sum of dollars [being a part of the tax raised in his county for the year], and that he fraudulently, and in breach of his trust, converted and appropriated to his own use said sum. Where the condition of a treasurer's bond was, that he "should keep a separate account in the Bank of A., as such treasurer, of all moneys," etc.: *Held*, that a breach might be assigned by negating the words of the condition, though only nominal damages could be recovered under it. *Albany Dutch Church v. Vedder*, 14 *Wend.* 165.

68. Bond Official.—In an action upon a sheriff's bond, the declaration did not charge the sheriff with a breach of his duty in the execution of any writ or process in which the real plaintiff was personally interested; but with a neglect or refusal to preserve the public peace, in consequence of which the plaintiff suffered great wrong and injury from the unlawful violence of a mob: *Held*, on motion in arrest of judgment, that the declaration did not show a cause of action. *South v. Maryland*, 18 *How. U.S.* 396.

69. Breach must be Assigned.—In a declaration upon a covenant for general performance of duty, if no breach be assigned, or a breach which is bad, as not being, in point of law, within the scope of the covenant, the defect is fatal, even after verdict. (*Minor v. Mechanics' Bank of Alexandria*, 1 *Pet.* 46, 67; compare *Snow v. Johnson*, 1 *Minn.* 48.) Where, in an action upon a sheriff's bond, the declaration did not charge the sheriff with a breach of his duty in the execution of any writ or process in which the real plaintiff was personally interested; but with a neglect or refusal to preserve the public peace, in consequence of which the plaintiff suffered great wrong and injury from the unlawful violence of a mob; the declaration did not set forth a sufficient cause of action against the sheriff and his sureties. *South v. State of Maryland*, 18 *How. U.S.* 396.

70. Change of Parties on Bond.—Where the principal causes his name to be stricken from a bond without their knowledge or consent, it is void as against the sureties. (9 *Wheat.* 702; 6 *Mass.* 521; *Martin v. Thomas*, 24 *How. Pr.* 315.) But the name of an obligor may be erased and a new obligor inserted, by consent of all parties, without making the bond void. (*Speake v. United States*, 9 *Cranch.* 28.) The question whether the addition of a surety, without the knowledge

of the former surety, avoids the bond, was raised in *O'Neal v. Long*, 4 *Cranch*, 60.

71. Collector's Bond.—The district attorney of a county has the authority, of his own volition, with or without instructions from the Controller of State, County Court, or the Board of Supervisors of a county, to bring an action upon the official bond of the Tax Collector of a county. (*People v. Love*, 25 *Cal.* 520.) In an action of covenant brought on a penal bond given to account for public moneys, if the breach assigned is the non-performance of the condition, the count will be adjudged bad on demurrer. The breach assigned must be the non-payment of the penalty. (*United States v. Brown*, 1 *Paine*, 422.) All the money due on a tax collector's bond may be recovered in a single action in the name of the People of the State, although part of the money thus due may belong to the County and part to the State. (*People v. Love*, 25 *Cal.* 520.) The complaint in an action on a tax collector's bond need not aver that the taxes charged on the assessment roll were legally assessed. (*Id.*) The securities on the official bond of a sheriff and *ex officio* collector of the revenue are liable for an act of the latter in collecting an assessment of taxes on property not subject to taxation. *State v. Shacklett*, 37 *Mo.* 280.

72. Constable.—An action on the official bond of a constable lies primarily upon breach of the condition of the bond, whether the injury for which suit is brought be a trespass or not, the result of the non-feasance or misfeasance of the officer. (*Van Pelt v. Littler*, 14 *Cal.* 194.) In an action against sureties on a constable's bond, in addition it must be alleged that the defendant had property which might have been levied upon, or that his body could have been found. *Lawton v. Erwin*, 9 *Wend.* 233.

73. Constable's Deputy.—In the absence of statutory provisions as to the appointment of deputies by constables, the common law rule applies, and constables may act by deputy, in the exercise of their ministerial functions. *Jobson v. Fennell*, 35 *Cal.* 711.

74. Copy of Bonds.—If a copy of the bond sued on is set out in the complaint, an answer denying its execution, which is not verified, admits its due execution. *Sacramento Co. v. Bird*, 31 *Cal.* 66.

75. County Assessor.—In suit upon the official bond of a county assessor, who had received a certificate of election, given bond,

and entered upon his duties, neither the principal nor the sureties can deny the official character of the assessor. They are estopped by the bond. *People v. Jenkins*, 17 *Cal.* 500.

76. Date of Bonds.—Where the date of a surety bond is subsequent to the appointment of the principal to office, the declaration should allege that the money collected by the principal remained in his hands at the time when the surety bond was executed. *United States v. Linn*, 1 *How. U.S.* 104.

77. Defect in Bonds.—If there is a defect in an official bond by the failure of the principal to place a seal opposite his name, the defect will not defeat a recovery thereon as against the sureties, if the defect is suggested in the complaint. *Sacramento Co. v. Bird*, 31 *Cal.* 66.

78. Delivery.—In suit on a bond, delivery must be alleged. *Garcia v. Satrustegin*, 4 *Cal.* 244.

79. Execution of Bonds.—If the complaint on an official bond avers the due execution of the same by both principal and sureties, and the answer takes issue on the avèrment, and the verdict and judgment are for plaintiff, the judgment will not be disturbed on appeal upon the judgment roll, on the ground that what purports to be a copy of the bond annexed to the complaint does not contain the signature of the principal. *Mendocino County v. Morris*, 32 *Cal.* 145.

80. For Selling Homestead.—A complaint against a sheriff and his sureties for selling under execution the homestead of plaintiff, which sets out that the sheriff was in possession of a certain execution against the plaintiff, Richard Roe, under which he sold the property, and averring damages in the sum of \$2,000, the value of the property is insufficient, as the same does not state facts sufficient to constitute a cause of action, for the sheriff's deed conveys nothing if the property was a homestead. *Kendall v. Clark*, 10 *Cal.* 18.

81. Judgment.—In an action against the principal and sureties on an official bond, the Court should first fix the amount of the defalcation of, or recovery from the former, and then proceed with a separate judgment against each of the sureties for the full amount for which he has made himself liable, and that each shall be satisfied by the collection or payment of such defalcation or of recovery and costs. (*People v. Rooney*, 29 *Cal.* 642.) A judgment for damages against an officer for

official delinquency which remains unsatisfied will not prevent a subsequent action on the official bond. *State v. Kruttschnitt*, 4 *Nev. Rep.* 178.

82. Liabilities of Obligors.—After a bond has been received and acted on by the county officers, the obligors are liable as if it had been approved; but this liability applies only to the duties properly appertaining to his office as such, and not to new duties belonging to a distinct office, with the execution of which he may be charged. (*People v. Edwards*, 9 *Cal.* 286.) If the penal sum is changed in an official bond after the principal obligor has executed the same, and he then forwards it for approval, he is liable on the bond as approved. (*People v. Kneeland*, 31 *Cal.* 288.) The liability is several as well as joint, unless expressed to be only joint, and the plaintiff may sue one or both sureties. (*Morange v. Mudge*, 6 *Abb. Pr.* 243.) The sureties on a sheriff's bond are not liable for his acts or omissions in the service of a precept which by law he was not authorized to serve. *Dane v. Gilmore*, 51 *Me.* 544.

83. Marshal's Bond.—In an action on a marshal's bond, it is not necessary to aver that the penalty has not been paid. The usual averment of the breach of the condition is sufficient. (*Sperring v. Taylor*, 2 *McLean*, 362; compare *Hazle v. Waters*, 3 *Cranch C. Ct.* 420.) To an action on a marshal's bond, for taking insufficient security on a replevin bond, a plea, in bar that a levy was made on goods and chattels, lands and tenements, sufficient to satisfy the judgment, is good. *Sedam v. Taylor*, 3 *McLean*, 547.

84. Ministerial Duties.—It is only for a breach of his duty in the execution of his *ministerial* offices, that the sheriff and his sureties are liable upon his bond. (*South v. Maryland*, 18 *How. U.S.* 396.) He should not be required to come prepared to justify his whole official conduct. *People v. Brush*, 6 *Wend.* 454; *People v. Russell*, 4 *Id.* 570.

85. Misjoinder of Causes of Action.—A cause of action on an official bond against the principal and his sureties, cannot be united with a cause of action for damages against the principal alone. *State v. Kruttschnitt*, 4 *Nev. Rep.* 178.

86. Non-Payment of Money.—Declaring on a sheriff's bond for the non-payment of money received by him for military fines, it is

not necessary to name who paid the money to him, or issued the warrants on which it was collected; a reference to the statute makes the breach certain enough. *People v. Brush*, 6 *Wend.* 45.

87. Notice.—No averment of notice to the defendant is requisite in the complaint, where the matters assigned as breaches lie as much in the knowledge of one party as the other. *People v. Edwards*, 9 *Cal.* 292; see *Tomlinson v. Rowe*, *Hill & D. Supp.* 410.

88. Receiver's Bond.—The sureties on a receiver's bond are only bound from the date of the bond; and if the bond bears date some months after the official term of the receiver commenced, the declaration is defective if it omits to show the receipt of the money after the date of the bond, and before the expiration of his official term. (*United States v. Spencer*, 2 *McLean*, 405.) A declaration which charged a receiver of public moneys with not paying over moneys which came into his hands the day after his bond expired: *Held* bad on demurrer. *Id.*

89. Request or Demand.—Where a county treasurer has embezzled and converted money of the County, it is not necessary for the supervisors to make a request or demand before a suit on his bond. *Supervisors of Allegany v. Van Campen*, 3 *Wend.* 48.

90. Retaining Commissions.—In an action on an official bond of a county treasurer, if the complaint avers only a breach by a failure of the treasurer to keep the money in the county safe, and by a withdrawal of the same and conversion to his own use, a recovery cannot be had for a failure of the treasurer to pay into the treasury his commissions retained on payments made to the State. *Sacramento County v. Bird*, 31 *Cal.* 66.

91. Retaining Money.—An averment in a complaint on a county treasurer's official bond that he received money belonging to the County and retains it, and refuses to deliver it to his successor in office, is a sufficient averment of a breach of its conditions. *Mendocino County v. Morris*, 32 *Cal.* 145.

92. Treasurer's Bond.—A complaint in an action against a treasurer, for a failure to pay to his successor money which came into his hands, should allege that it remained in his hands at the expiration of his term. (*Pickett v. State*, 24 *Id.* 366.) And where the treasurer has paid over to his successor the amount found due against him, he is still

liable for all moneys actually received by him as such treasurer, and by mistake not charged to him in such accounting. (*Jefferson Co. v. Jones*, 19 *Wis.* 51.) The liability of the sureties continues till he has rendered a just and true account of such moneys. *Id.*

93. Trespass.—A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff, should allege that the bond was the sheriff's official bond, and set out enough of its contents to show that those who signed it were bound to indemnify parties injured by the sheriff's malfeasance. (*Ghirardelli v. Bourland*, 32 *Cal.* 585.) In trespass for taking goods, against a sheriff who justified under a writ of attachment against a third person, he called as a witness his deputy, who stated that he served the attachment, and related certain conversation between himself and the plaintiff. On cross-examination he stated that "he was deputy sheriff, and under bonds to the sheriff." Whereupon plaintiff moved to strike out his testimony on the ground of interest. *Held*, that the motion was properly denied, as from the answer it was not certain that the character of his bonds was such as to make him interested. (*Towdy v. Ellis*, 22 *Cal.* 650.) If the complaint in an action against a sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, there is a misjoinder of causes of action. (*Ghirardelli v. Bourland*, 32 *Cal.* 585.) A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff, which merely avers that the sureties are the securities on his official bond, and that the same was duly filed, executed and recorded, does not state a cause of action on the bond. (*Id.*) In an action on a replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property. *Hunt v. Robinson*, 11 *Cal.* 562.

CHAPTER X.

ON WARRANTIES OF CHATTELS.

No. 319.

i. Warranty of Title.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant sold to the plaintiff [*state the articles sold*], for dollars.

II. That by said contract of sale it was understood by the plaintiff and defendant to be, and it was a part of the terms and consideration of said contract of sale, that the defendant had the lawful right and title to so sell, and to transfer the ownership of said goods to the plaintiff.

III. That the defendant had, in fact, no right or title to sell or dispose of said goods.

IV. That one E. F. then was the owner of said goods, and afterwards, on the day of, 187., he demanded possession of the same from the plaintiff; and the plaintiff was compelled, and did then deliver them up to E. F., and they were wholly lost to the plaintiff.

V. That by reason of the premises, the plaintiff was misled and injured, to his damage dollars.

[*Demand of Judgment.*]

1. Implied Warranty.—Where the vendor of chattels in his possession gives a written bill of sale containing no covenant of warranty, there is an implied warranty. (*Miller v. Van Tassel*, 24 *Cal.* 458.) The vendor in possession warrants the goods by implication; (*Id.*) unless at the time he expressly disavows an intent to do so. (*De Freeze v. Trumper*, 1 *Johns.* 274; *Heermance v. Vernoy*, 6 *Id.* 5; *Rew v. Barber*, 3 *Cow.* 272.) But if out of the possession of the vendor, in the absence of fraud, the buyer takes at his own risk. (3 *Kent* (5 *Ed.*) 478; *McCoy v. Articher*, 3 *Barb.* 323; *Dresser v. Ainsworth*, 9 *Id.* 619; *Edick v. Crim*, 10 *Id.* 445.) The use of a certain name in a sale note for the goods sold, is a warranty that they bear that name. (*Flint v. Lyon*, 4 *Cal.* 17.) The complaint need not aver the warranty, for this implied warranty is an inference of law. *Brucker v. Froment*, 6 *T. R.* 659; *Van Santv. on Pl.* 287.

2. Measure of Damages.—In an action upon an implied warranty, the measure of damages is damages and costs recovered by the true owner, with interest thereon. (*Blasdale v. Babcock*, 1 *Johns.* 517; *Armstrong v. Percy*, 5 *Wend.* 535.) But where the goods are replevied of the buyer, its value alone, and not damages for its detention, nor attorneys' fees paid by him for defending the title, is held to be the measure of damages. *Id.*; but see *Lewis v. Peake*, 7 *Taunt.* 152.

3. Waiver of Warranty.—The complaint in an action to recover the price of a machine, sold with a warranty, under an agreement that the continued use of the machine by the vendee should be regarded as a waiver of the warranty, need not allege that the machine corresponded with the warranty if it avers the continued use of it by the vendee. *Bragg v. Bamberger*, 23 *Ind.* 198.

4. Warranty of Title.—If the seller has possession of the article, and sells it as his own and not as agent for another, and for a fair price, he is understood to warrant the title. (2 *Kent's Com.* 478.) In New York, a warranty of title is implied from an unqualified sale. (*Carman v. Trude*, 25 *How. Pr.* 440; *Scranton v. Clark*, 39 *Barb.* 273; and see *Sweetman v. Prince*, 26 *N.Y.* 224.) And it extends to the right to the use of the thing sold, *e.g.*, a patented article. (*Carman v. Trade*, 25 *How. Pr.* 440.) But it arises only in cases where the vendor is in possession. (*Scranton v. Clark*, 39 *Barb.* 273.) In every sale of personal property, except a judicial sale, there is implied warranty of title or of peaceable possession. *Porte v. United States*, *Dev.* 57; see *Packett v. United States*, *Id.* 103.

*No. 320.**ii. On Warranty of Quality.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant warranted a steam engine to be in good order, and thereby induced the plaintiff to purchase the same of him, and to pay to him dollars therefor.

II. That the said steam engine was not then in good working order, whereby plaintiff was damaged in the sum of dollars.

[Demand of Judgment.]

5. Assignment of Breach.—The agreement to take back property, sold under a warranty of soundness, but which proved unsound, or whereby defendant agreed to pay a sum of money in consideration of said unsoundness and consequent rescission of sale, does not require assignment of a breach, within the meaning of the Code. *Stone v. Watson*, 37 *Ala.* 279.

6. Averment of Warranty.—A general averment of warranty is sufficient, as that the seller warranted the article to be of good quality. *Hoe v. Sanborn*, 21 *N.Y.* 552.

7. Caveat Emptor.—That the buyer must take care or be on his guard (*Hob.* 99; *Co. Litt.* 106, a; 2 *Inst.* 714; *Broom's Max.* 605) is a leading maxim of the law relating to the contract of sale; and its application is not affected by the circumstance that the price is such as is usually given for a sound commodity. (2 *Steph. Com.* 326; *Cro. Jac.* 2; 1 *Seld* 88; 1 *Smith Lead. Cas.* 78; 2 *Wood's Lect.* 251; 2 *Kent's Com.* 478; 1 *Stry. Eq. Jur.* 212.) If the vendor warrants the quality of the articles he sells, he is bound to deliver them of the stipulated quality, and the examination and selection of some of the articles by the vendee when they are delivered, does not amount to a waiver of the contract. *Willings v. Consequa*, *Pet. C. Ct.* 301.

8. Damages on Breach.—Under the forms of pleading at common law, when the vendee of chattels sold with a warranty of title could, on a breach of the warranty, recover damages in *assumpsit*, or he might sue in an action on the case for deceit, if there had been deceit, as well as warranty of title; but, in the first case, he must aver specially that the defendant warranted his title to the property, and that a breach of the warranty had occurred, and in the latter, that the defendant falsely or fraudulently represented himself to be the owner of the property, and that he knew his representations were false. *Miller v. Van Tassel*, 24 *Cal.* 458.

9. Damages, Measure of.—When the vendor of personal property is sued for a failure of title, the measure of damages is the price paid by the plaintiff. *Arthur v. Moss*, 1 *Or.* 193.

10. Executory Contract.—An executory contract for the sale of corn requires that it shall be in good and marketable condition, without express words to that effect. (*Peck v. Armstrong*, 38 *Barb.* 215; and see *Rook v. Handy*, 41 *Id.* 454.) A contract to deliver to the defendants, who were manufacturers of barrels and staves, a certain quality of stave bolts, was *held* to require a delivery of bolts of a good merchantable quality, and suitable for the purposes for which they were intended. (*Ketchum v. Wells*, 19 *Wis.* 25.) A contract for the sale of "oxalic acid," even when the seller is not the manufacturer, and at the time of contracting expressly declines all responsibility as to the quality, and the buyer has an opportunity of inspecting it, and no fraud exists is not complied with by the delivery of an article which does not in commercial language come properly within the description of "oxalic acid." *Josling v. Kingsford*, 13 *C. B. (N.S.)* 447.

11. Fraud need not be Alleged.—No averment of knowledge of fraud is necessary to support this action. (*Case v. Boughton*, 11 *Wend.* 106; *Holman v. Dord*, 12 *Barb.* 336; *Williamson v. Allison*, 2 *East*, 446.) Such an allegation sounds in tort. (*Robinson v. Wheeler*, 25 *N.Y.* 252.) And if inserted in the complaint (*Edick v. Crim*, 10 *Barb.* 445) the plaintiff may be compelled to elect on the trial between the two grounds of liability. *Springsteed v. Lawson*, 14 *Abb. Pr.* 328; *Sweet v. Ingerson*, 12 *How. Pr.* 331.

12. Implied Warranty.—On a sale of an existing article, there is no implied warranty that the article is suitable for the purpose for

which it was purchased. (*Milburn v. Belloni*, 34 *Barb.* 607.) In every agreement for the future sale of merchandise, there is an implied warranty that it shall be merchantable. (9 *Wend.* 28; 17 *Id.* 277; 20 *Id.* 64; *Hamilton v. Ganyard*, 34 *Barb.* 204.) So, when one sells an article of his own manufacture, there is an implied warranty that the article is free from any defect produced by the manufacturing process itself; and where the defect is in the materials employed, only where he is shown or may be presumed to have known the defect. *Hoe v. Sanborn*, 21 *N.F.* 552.

13. Quality, how Averred.—The unsound condition of the chattel should be averred according to the fact, in direct and positive terms, and if valueless, that it was worth nothing, and was of no value. *Deifendorf v. Gage*, 7 *Barb.* 18.

14. Sale by Sample.—On a sale by sample there is an implied warranty that the article shall correspond with the sample; but an examination of samples when there is an express warranty is not a waiver of the warranty. (*Willings v. Consequa*, *Pet. C. Ct.* 301.) The law presumes that the only warranty is that the bulk shall conform to the sample in kind and quality. *Ramsdell v. United States*, 2 *Ct. of C. R. (Nott. & H.)* 508.

15. Warranty of Quality.—No particular form of words is essential to constitute a warranty of quality. An assertion of the vendor, if relied upon by the vendee, and understood by both parties as an absolute assertion and not merely an expression of opinion, will amount to one. (*Moore v. McKinlay*, 5 *Cal.* 471; 24 *Barb.* 549; 19 *Johns.* 290; 6 *Barb.* 557; *Wilbur v. Cartwright*, 44 *Barb.* 536.) Where the plaintiff inspects the goods before purchasing, the case is taken from the operation of the rule of implied warranty. (*Moore v. McKinlay*, 5 *Cal.* 471.) The grounds and principles upon which warranties of title, of quality, etc., are implied, considered in (*Hoe v. Sanborn*, 21 *N.F.* 552.) An advertisement of goods for sale, giving them a higher character than upon examination they turn out to merit, will not amount to a warranty, where the purchaser relies upon his own inspection. *Calhoun v. Vechio*, 3 *Wash. C. Ct.* 165; *McVeigh v. Messersmith*, 5 *Cranch C. Ct.* 316.

*No. 321.*iii. *On Warranty of Soundness.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant sold to the plaintiff a horse, for dollars.

II. That by the said contract of sale the defendant warranted the said horse to be sound, and thereby induced the plaintiff to purchase the same of him, and to pay him therefor the said price of dollars.

III. That the said horse was at the time of said sale unsound in this; that [*state wherein he was unsound*].

IV. That the plaintiff was misled and injured thereby, and has sustained damages by reason of the premises, to the amount of dollars.

[*Demand of Judgment.*]

16. Duty of Purchaser.—A purchaser cannot proceed without inquiry or examination, and use an article which will damage his business, relying upon a warranty which only goes to the fact of the nature or character of the article, and not to the effect of using it, and still hold the vendor responsible for the consequences. *Milburn v. Belloni*, 34 *Barb.* 607.

17. Measure of Damages.—The plaintiff may recover the difference between the value of the chattel as warranted and as found to be by the Court or jury, and special damages for injuries occasioned by the condition of the chattel. *Jeffrey v. Bigelow*, 13 *Wend.* 518.

18. Special Damages.—Special damages for injuries occasioned by the condition of the chattel must be averred, as the communication of infectious diseases by an animal warranted sound. *Jeffrey v. Bigelow*, 13 *Wend.* 518.

19. That Plaintiff Relied on Warranty.—A complaint which alleges that plaintiff purchased of defendant twenty seven head of hogs; that defendant represented them to be sound and healthy; that the plaintiff relied upon said representations, having no opportunity by ordinary diligence to discover that the same were not true; that in fact they were diseased and unhealthy, being then infected with hog cholera, and known to be so by the defendant, and that afterwards twenty-five of them died of that disease, is good on demurrer. *Baker v. McGinniss*, 22 *Ind.* 257.

20. That Plaintiff was Misled.—The complaint must aver that the plaintiff was actually misled by reason of the warranty. *Holman v. Dord*, 12 *Barb.* 336; *Oneida Manufacturing Society v. Lawrence*, 4 *Cow.* 440.

21. Warranty of Soundness.—A general warranty of soundness covers even visible defects of a chattel, unless they are such as could be discerned by an ordinary observer without peculiar skill. (*Chitt. on Contr.* 456; *Pars. Merc. Law*, 57; 10 *Ves.* 507; 20 *Eng. C. L. R.* 269; *Birdseye v. Frost*, 34 *Barb.* 367.) A mere cold, controllable by ordinary remedies, not affecting the general health or usefulness of a horse, is not an unsoundness. (*Springsteed v. Lawson*, 14 *Abb. Pr.* 328; 23 *How. Pr.* 302.) A guaranty that the articles should pass inspection is nothing more than the usual warranty of the soundness and quality of the thing sold. *Gibson v. Stevens*, 8 *How. U.S.* 384.

No. 322.

iv. On a Warranty of a Judgment.

[TITLE.]

The plaintiff complains, and alleges :

I. That on the day of, 187., the defendant, for a valuable consideration, assigned to this plaintiff a judgment which on the day of, 187., he recovered in the District Court of the Judicial District, County of, for the sum of dollars, in a certain action wherein A. B.,

defendant above named, was the plaintiff, and one C. D. was defendant.

II. That said assignment contained a covenant on the part of the defendant, of which the following is a copy: [*Copy of the covenant.*]

III. That in truth, at the time of said assignment, said judgment had been paid in full to the defendant, and no part thereof was or now is due thereon.

IV. That by means of the premises this plaintiff was misled and injured, to his damage dollars.

[*Demand of Judgment.*]

No. 323.

v. *On a Warranty of a Note.*

[TITLE.]

The plaintiff complains, and alleges :

I. That on the . . . day of, 187., the defendant offered to pass to the plaintiff, for a valuable consideration, a promissory note, of which the following is a copy: [*copy of the note*—and he then and there warranted the said note to have been made by the said A. B.

II. That the plaintiff, relying upon said warranty, purchased said note of the defendant, and paid therefor the sum of dollars.

III. That said note was not made by said A. B., that his name was forged thereto.

IV. That by reason of the premises the plaintiff was injured and misled, to his damage dollars.

[*Demand of Judgment.*]

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